UNITED STATES DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

JUNE 6, 2001

Serial No. 37

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://www.house.gov/judiciary

U.S. GOVERNMENT PRINTING OFFICE

72–980 PDF WASHINGTON : 2001

For sale by the Superintendent of Documents, U.S. Government Printing Office
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UNITED STATES DEPARTMENT OF JUSTICE

WEDNESDAY, JUNE 6, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 2 p.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order.

Today, the Committee will conduct an oversight hearing on the United States Department of Justice.

Recently, our Crime, Immigration and Claims, and Commercial and Administrative Law Subcommittees held similar hearings focusing on the Justice Department's budget request for 2002. Today's hearing will build upon the Subcommittee hearings and open our first dialogue with our new Attorney General, John Ashcroft.

I am pleased that many of the President's initiatives are contained in his proposed budget for the Justice Department. Some of those include new funding for the Immigration and Naturalization Service to help secure our borders, new funding for the FBI to combat terrorism and cybercrime, and new funding for the DEA to improve its efforts to fight the scourge of drugs and violence.

Notwithstanding these priorities, I support the administration's decision to take a breather from the hefty budget increases that the Department has received in the last decade. The DOJ's budget has dramatically increased from $11 billion in fiscal year 1993 to more than $21 billion this year. It is not clear that the Department's management resources have been able to keep up with the explosive funding increases. It is my intention to conduct vigorous oversight of the Department to ensure that the funds are properly spent, that individuals responsible for managing the Department and its programs achieve appropriate, measurable results and that the Department's mission is not impeded by outdated or inadequate technology.

I am concerned that the Department, which is a respected and revered institution, has lost its way. Like the slugger who has lost his swing, I think it is time for this new administration to focus upon fundamentals. If the Department can't get the basics right, the American people will inevitably lose confidence in it, one of our most trusted institutions.

Though the FBI may be the most capable law enforcement on the planet, recent disclosures about troubles at the FBI have raised serious concerns. The McVeigh debacle, the Hanssen spy case, and corruption in the Boston office and other issues indicate that there

are numerous personnel, management, and systems challenges that face the Bureau.

It is time to focus on fundamentals at the FBI and today we will ask how these fundamentals will be improved.

I want to make it clear that I respect and admire the men and women of the FBI. Most of them are the cream of the crop, and this Nation is safer because they are on the job. The FBI has had many great successes, but its recent failures beg for reform. The Congress and the administration should directly address these issues to make the greatest investigative agency in the world even better.

Our focus should not be on the FBI alone. One of the most dysfunctional agencies in all of government is the Immigration and Naturalization Service. They are often slow, ineffective, and wasteful. One can't digest all the Inspector General and General Accounting Office reports on the problems that plague the INS.

This Nation is challenged by the flood of illegal immigrants and we don't properly serve legal immigrants. Too often the INS is part of the problem, and hopefully we will start to hear about the solutions.

Speaking of fundamentals, I am concerned that while we have drastically increased spending on some dubious grant programs over the last decade, we have neglected some basic Federal law enforcement assets and resources. For example, the FBI can't even send e-mail across the street to folks at Main Justice.

We are told that some attorneys at the Justice Department are working on old 286 and 386 computers that crash almost as much as they're up and running. Many DOJ computers still use 28.8 Baud modems to connect to various DOJ databases. Often our Federal law enforcement officers are using less sophisticated equipment than the modern-day criminal. It's time to address these deficiencies and to bring important assets into the 21st century.

I am also concerned about the Criminal Division. It has become a policy and managerial body and is no longer a cutting-edge litigation division. This administration must make a decision, is the Criminal Division going to be a bureaucratic, paper-shuffling shop, or will it focus on hard-nose litigation prosecutions. If the former, we should cut staff and ship them out into the field where they're needed.

These are some of the many issues Attorney General Ashcroft and his new team must make. It is a daunting and criminal—excuse me, a daunting and critical task.

We wish you all the best and we look forward to working with you to ensure that the Justice Department and all of its components reach their full potential. The American people deserve no less.

And I now yield to the gentleman from Michigan, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Chairman Sensenbrenner.

Good afternoon, Attorney General Ashcroft. I want to thank you for being here today, and for the outreach that you have undertaken this year. I personally appreciate your consistent efforts to maintain a dialogue with Democrats.

Now, in the most respectful terms possible, I must tell you that at this early stage of your tenure some of the actions of the Depart-

ment have been very troubling to me and run counter to your confirmation hearing representations that you would enforce the law and run a Department free from politics.

First of all, I hope—and I've mentioned this to you before at the Department of Justice—I hope you can find it in your heart and, if you need to, to pray over your relationship with Ronnie White. I have been very troubled with that relationship, and I hope that you will keep reexamining it.

Elected officials, like everyone else in this country, deserve to be tried in the courts and not in the press; and I am sorry to say that when it comes to Senator Robert Torricelli, your Justice Department has been leaking like Niagara Falls. This public flogging of that Senator appears to have increased considerably within the 48 hours of Senator Jeffords' party switch and creating—and created an impression, true or false, that this White House and the Justice Department intended to use the criminal processes to perhaps retake the United States Senate.

Now, there's one way that you can help relieve that impression, or misimpression, and that is to follow the precedent established by your predecessor, the Republican Attorney General Dick Thornburgh in the first Bush administration. When the Department leaked damaging information and innuendo on a Member of this House, he conducted a thorough investigation and, using polygraph examinations, ultimately discovered the source of these leaks and relieved that person of those duties.

Now, this becomes especially important, given the fact that you have previously commented on the Torricelli matter in an earlier fund-raising letter of yours, using the unfortunate word "corruption" in connection with that Senator, that you sent out last year. Anything less than a duplication of the Thornburgh investigation will simply reinforce the perception, true or false, that the Department is using the criminal justice system to politicize in an area that it has absolutely no business doing it.

And so I call on you today to conduct such an independent investigation, and hope that you would address these matters as you choose in your comments this afternoon.

I'm also extremely troubled by a letter that you wrote to James J. Baker of the National Rifle Association, and in that letter you indicated that you believe in an individual, as opposed to a collective, right to bear arms. And in doing so, you appear to breathe life into a Texas judge's extreme and activist and lonely ruling that the Brady laws prohibition on wife beaters having guns is unconstitutional under the second amendment.

We need to know whether this means that you believe the Brady Act and assault weapons bans are unconstitutional and whether the Department will now take that position in the Texas Emerson case.

I'm finally troubled by the daily prayer sessions that you lead at your Federal public office, not the ones that we, as Members, when we have breakfast with you, engage in a prayer that you lead with us, but I'm talking about the ones that are open, that you invite everybody in the Department to come in and join you at; and I wonder whether you have the sensitivity to understand what this may be doing.

I'm glad that you pray. I do, too. But the way you conduct your prayer sessions in your office creates an atmosphere where people feel that they may be ostracized if they don't participate. Where there's an unspoken rule that compatibility with their boss depends on their participating in his faith, this could, sir, create lots of problems and lots of confusion among the thousands of people that work for you at the Department of Justice.

Can't you see how some people would feel, as a result, that they might have to choose between their job and faith?

In your confirmation hearings you said, quote, "The Attorney General must lead a professional, nonpartisan, Justice Department that is uncompromisingly fair, defined by integrity and dedicated to upholding the rule of law." Well, I can only hope today that we can discuss to what extent these actions I have described live up to those ideals.

And I thank you, Mr. Chairman.

Chairman SENSENBRENNER. General Ashcroft, would you please rise to take the oath.

[witness sworn.]

Chairman SENSENBRENNER. Without objection, the Attorney General's full statement will be included in the record.

And, General Ashcroft, please proceed as you will.

TESTIMONY OF THE HONORABLE JOHN ASHCROFT, ATTORNEY GENERAL

Attorney General ASHCROFT. Mr. Chairman, I want to thank you. It is both an honor and a privilege to appear before you and before this Committee to discuss the programs and activities of the Justice Department. As a former Member of the Judiciary Committee in the other House, I always am pleased to see authorizers seeking to be a part of and establishing the purposes for which the Department is authorized.

It's been over 20 years since the last comprehensive authorization for the Department of Justice was enacted. To put that in perspective, 20 years ago I was Attorney General of the State of Missouri. Today, I'm Attorney General of the United States. I appreciate your efforts. Progress can take time, but it is possible; and I'm grateful for your energy and your purpose here.

The responsibility for the United States system of justice is nothing less than the responsibility for freedom. And to carry the weight of such a responsibility is a rare privilege in the history of human affairs. The United States Department of Justice today is dedicated to a single proposition: the energetic enforcement of the rule of law, including protecting the civil rights of all Americans.

Over the past several weeks, I have had the privilege of meeting informally over coffee and orange juice with many of you to listen to your concerns, to discuss advancing the course of justice. So far, I think I've met with about half of you, and I look forward to meeting with the remaining Members in the next several weeks. I've been pleased to find that many of the priorities that you have expressed are very closely related to the priorities which I believe this administration is pursuing.

We share a respect for the rule of law and the defense of people and property that the rule of law demands. And we share a respect

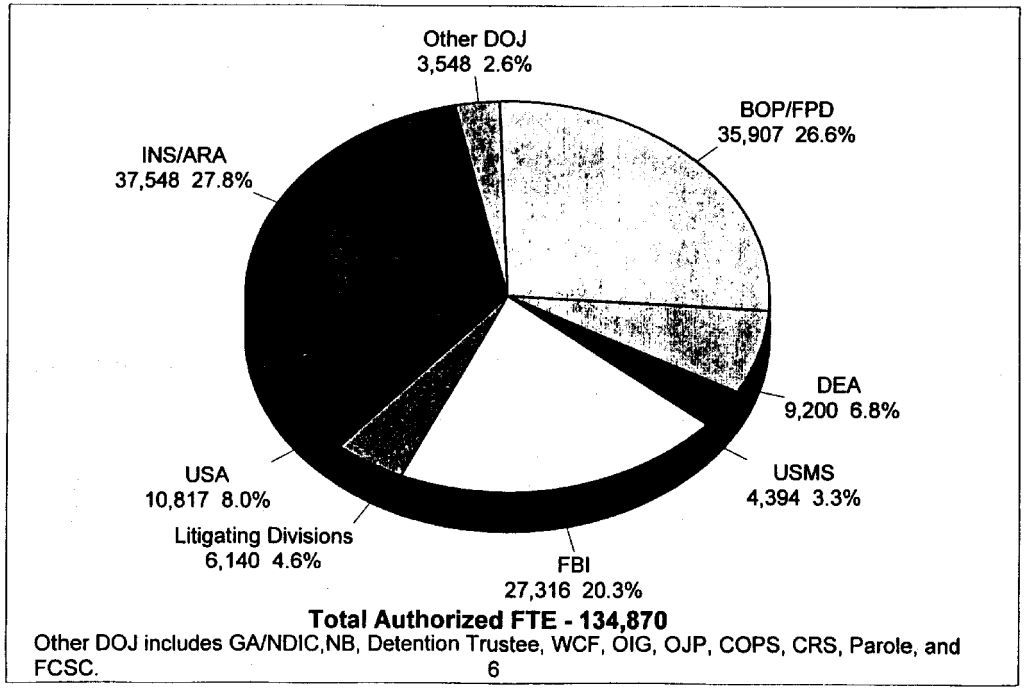
for the enforcement of civil rights and the cultivation of human potential that such respect permits.

As Attorney General, I have had no higher priority than protecting the civil rights of all Americans. When racial unrest erupted in Cincinnati last month, the Department of Justice responded immediately, working with the mayor and other community leaders to help restore calm, calm on the streets of Cincinnati and elsewhere. Our message, echoed in everything that we do at the Department, is that government judging its citizens on the basis of their race is wrong and must not stand.

The President has asked me to assess the extent and nature of one form of discrimination, racial profiling, and to report back to him with my recommendations. To make good on our commitment to improve the just and equal administration of our Nation's laws, our 2002 budget increases funding for civil rights enforcement to over $100 million.

Department of Justice

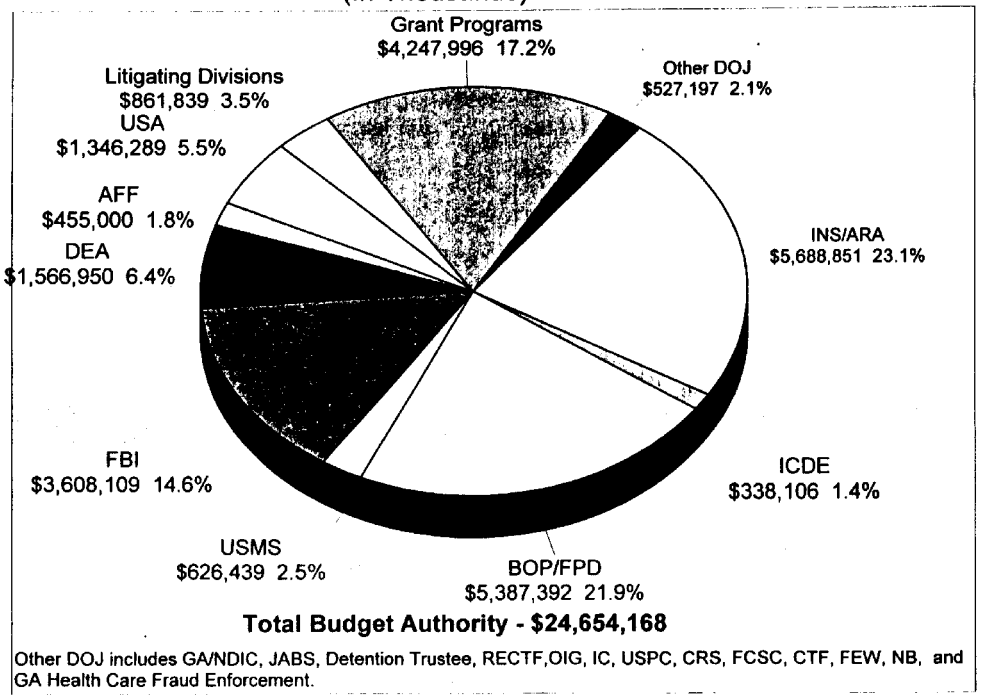
2002 FTE by Agency



Total Authorized FTE - 134,870

Other DOJ includes GA/NDIC,NB, Detention Trustee, WCF, OIG, OJP, COPS, CRS, Parole, and FCSC.

Department of Justice
2002 Budget Authority by Agency
(In Thousands)

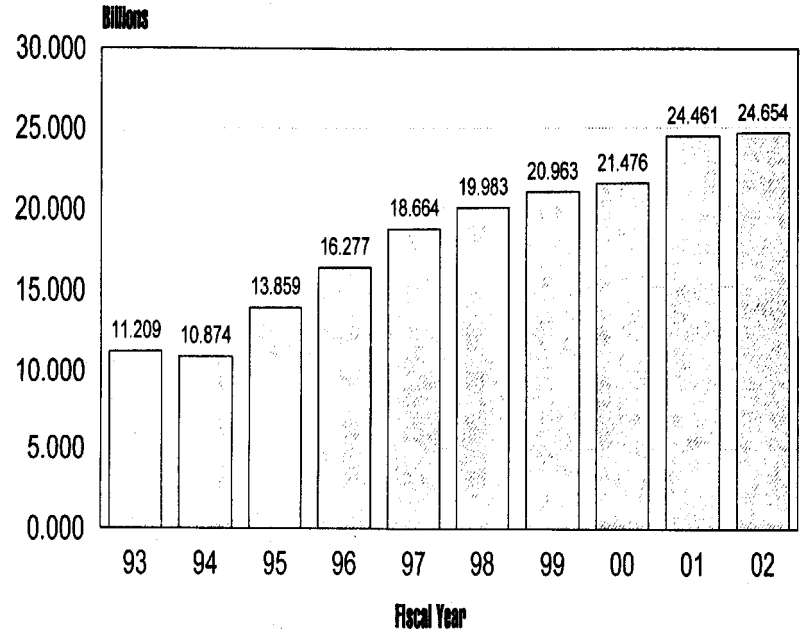


Total Budget Authority - $24,654,168

Other DOJ includes GA/NDIC, JABS, Detention Trustee, RECTF,OIG, IC, USPC, CRS, FCSC, CTF, FEW, NB, and GA Health Care Fraud Enforcement.

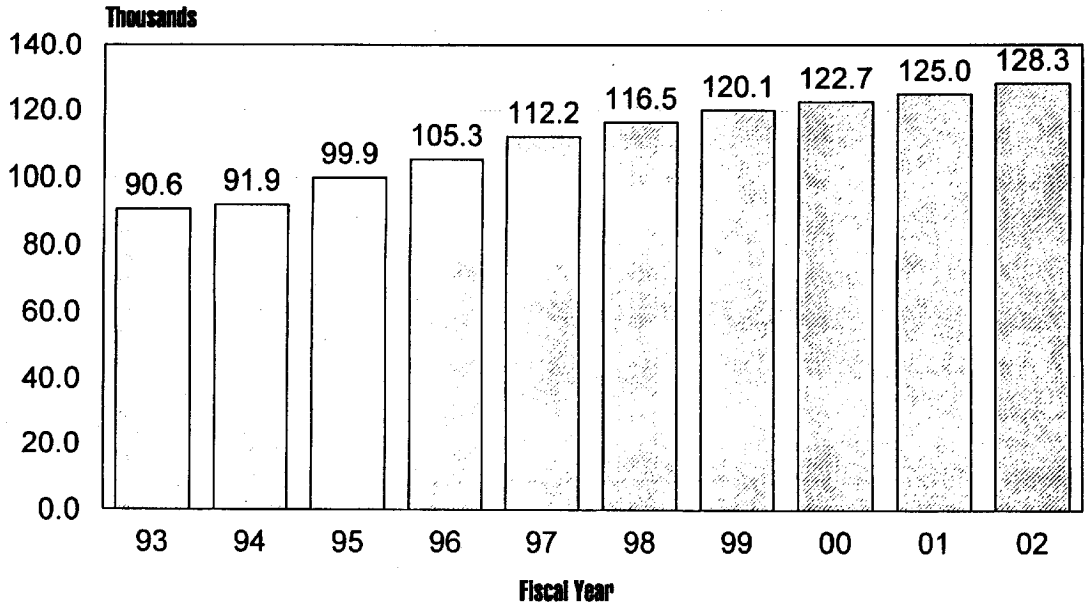
Department of Justice

Budget Authority 1993 - 2002



Department of Justice

Authorized Positions 1993 - 2002



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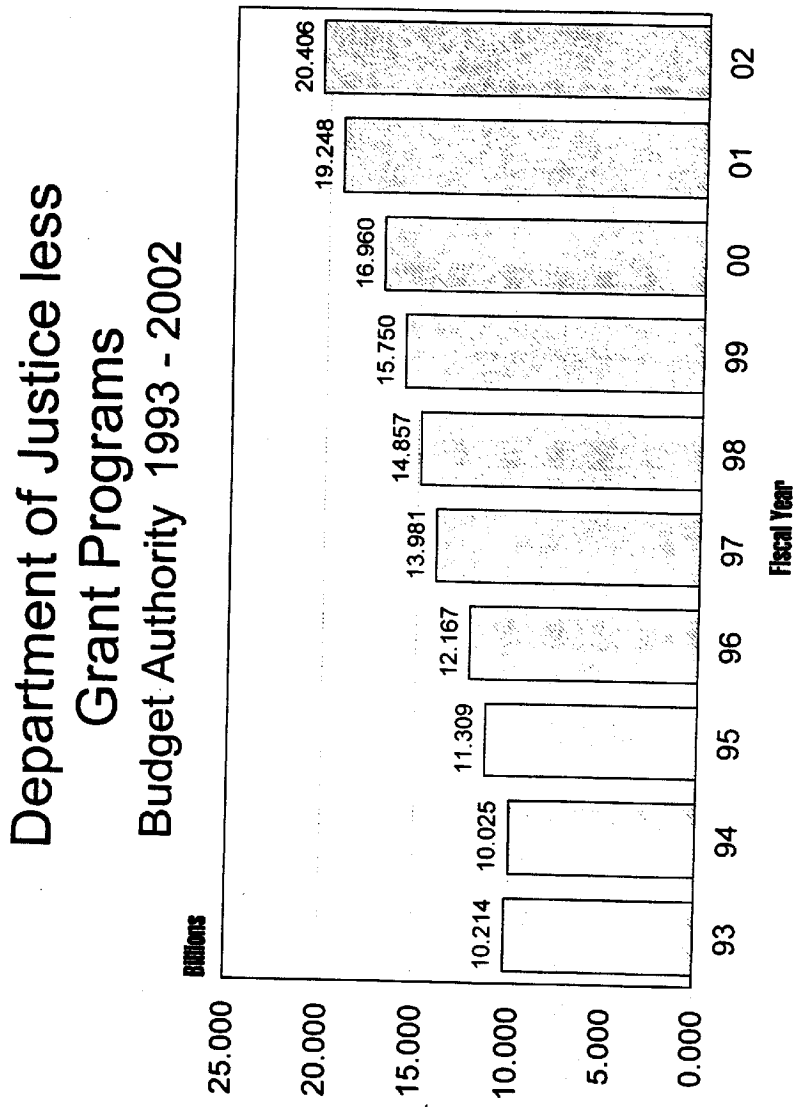
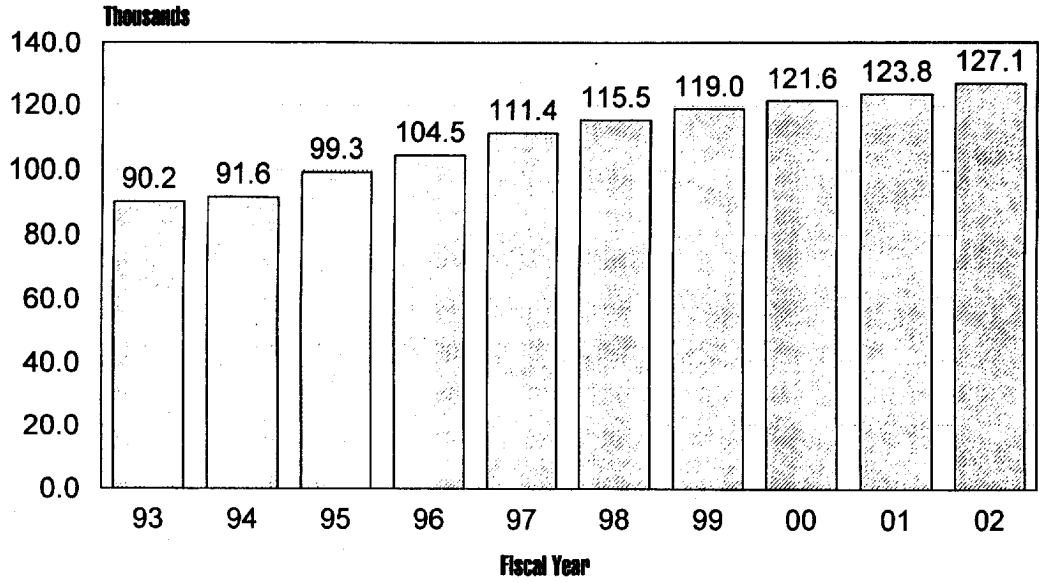

Department of Justice less
Grant Programs
Budget Authority 1993 - 2002
Billions
25.000
20.000
15.000
10.000
5.000
0.000
10.214
10.025
11.309
12.167
13.981
14.857
15.750
16.960
19.248
20.406
93
94
95
96
97
98
99
00
01
02
Fiscal Year

Department of Justice less Grant Programs

Authorized Positions 1993 - 2002



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FY 2002 BUDGET REQUEST HIGHLIGHTS

The Justice Department's FY 2002 budget provides $2.078 billion in program enhancements, comprised of new appropriations, redirected resources, and non-appropriated funding. In total, the FY 2002 budget seeks $24.65 billion for the Department of Justice, including $3.71 billion in mandatory resources such as fees, and $20.94 billion in discretionary spending.

The budget highlights include:

- $1.057 billion in additional funding to support our core federal law enforcement mission, including $949.5 million in increased funding to detain and incarcerate federal prisoners and $107.96 million in additional funding to support the Justice Department's counterterrorism, cybercrime, and counterintelligence efforts;

- $369.6 million in additional funding for critical law enforcement information and technology needs;

- $153.78 million in increased funding to reduce gun crime;

- $120.56 million in additional funding for combating drug use;

- $105.72 million in funding increases to stamp out racial discrimination and guarantee rights for the advancement of all Americans;

- $30 million in increased funding to empower communities in their fight against crime as well as $180 million for school resources officers and related initiatives; and,

- $240.14 million in new resources to improve services to immigrants and expand efforts to prevent illegal immigration.

BASIC LAW ENFORCEMENT NEEDS

The mission of the Justice Department is to enforce the law and defend the interests of the United States according to the law; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; to administer and enforce the nation's immigration laws fairly and effectively; and to ensure fair and impartial administration of justice for all Americans. The FY 2002 budget includes $1.057 billion to address portions of these functions, specifically for detention, incarceration, antiterrorism, cybercrime, and counterintelligence.

INCREASING DETENTION AND INCARCERATION CAPACITY

The number of inmates in the Federal Prison System has more than doubled since 1990 as a result of tougher sentencing guidelines, the abolition of parole, minimum mandatory sentences, and significant increases in law enforcement efforts. This surge in the prison population continually tests the limits of our detention and incarceration capacity. The Justice Department requests a $949.5 million increase in funding to support the federal responsibility of detaining individuals awaiting trial or sentencing in federal court, and incarcerating inmates who have been sentenced to imprisonment for federal crimes.

Federal Bureau of Prisons (BOP)

Prison Construction

- **$669.97 million** to fund three Federal Corrections Institutions (FCI) and four U.S. penitentiaries (USP). In addition, partial site and planning funds for two female and two male facilities are included.

Prison and Correctional Facility Activation

- **$81.85 million** and 754 positions for initial activation of FCI in Petersburg, VA; USP and FPC Camp in Lee County, VA; and includes equipment for FCI in Glenville, WV and USP in Canaan, PA.

Contract Confinement

- **$57.44 million** and 12 positions to meet the anticipated increase in the prison population. This includes $18.91 million and 8 positions for an additional 1,500 beds to accommodate the increasing number of criminal aliens due to higher immigration case prosecutions, and $38.53 million and 4 positions to support a general contract population increase of 1,499 inmates.

Immigration and Naturalization Service

Detention Capacity and Staffing

- **$42.3 million** and 158 positions to keep pace with the growth in INS enforcement activities in recent years. Resources will be used for staff, transportation, and removal costs associated with the requested increase of 1,607 detention beds.

Detention Construction Projects Underway

- **$31.89 million** to accommodate increases in the INS detainee population. The total number of apprehended illegal aliens consistently exceeds available detention space. Resources will be used to support the planning and construction of additional space in order to accommodate the expanding detainee population.

United States Marshals Service

Impact of D.C. Revitalization Act

- **$2.73 million** and 42 positions to support the anticipated workload increase as a result of the National Capital and Self-Government Act of 1997. The closure of the prison complex in Lorton, VA, mandated by the Act, will require the USMS to spend more time and resources transporting prisoners from remote areas to and from court in DC. In addition, USMS will be responsible for monitoring and paying for the transport of DC prisoners from their designated prisons to DC and back in accordance with court-orders. The Act also federalizes the DC parole authority and merges all matters under the U.S. Parole Commission causing a significant increase in parole violation warrants and detainers.

Staff and Equipment for New Courthouses

- **$9.39 million** and 52 positions (Deputy U.S. Marshals and Detention Enforcement Officers) for staffing and equipping courthouses that are new or undergoing significant renovation. These courthouses require security and other equipment to ensure safety, and additional staff for prisoner handling and security in the courthouses and cellblocks.

Prisoner Movements

- **$3.46 million** for additional air movements of USMS prisoners. The number of USMS prisoner movements rises annually in direct relationship to the increase in prisoner population.

Federal Prisoner Detention

Jail Day Increase

- **$48.79 million** to meet medical and housing costs associated with an increase in the number of jail days for USMS detainees in non-federal facilities. This will provide an additional 1,030,381 contract jail days over the FY 2001 appropriated level.

United States Parole Commission

District of Columbia Parole Revocation/Supervised Release Hearings

- **$1.65 million** and 37 positions to support the anticipated increase in workload associated with the U.S. Parole Commission's takeover of the District of Columbia's parole revocation hearing function and supervised release hearing function, as outlined in the D.C. Revitalization Act.

FIGHTING TERRORISM, CYBERCRIME, AND FOREIGN COUNTERINTELLIGENCE

Preventing terrorism, deterring computer crime and thwarting foreign espionage are among the most serious challenges facing law enforcement today. The Justice Department must act aggressively to prevent, mitigate, and investigate acts of terrorism against the American people, as well as to defeat threats to our nation's security. In FY 2002, the Justice Department requests an additional $107.96 million to support counterterrorism, cybercrime, counterintelligence, and other efforts.

COMBATING CYBERCRIME

Federal Bureau of Investigation

Data Network Interception

- **$18.58 million** and 10 positions (2 agents) to examine emerging and future data network communications technologies, conduct research, and develop solutions for performing court-authorized electronic surveillance in network environments. This request includes $10.92 million for Casa de Web, a multi-year automated information initiative for storing and managing lawfully collected electronic surveillance intelligence and evidentiary material among FBI field offices.

Counter-encryption

- **$8.2 million** and 13 positions to acquire equipment and services to further law enforcement counter-encryption capabilities and to increase staffing for collection of

court authorized evidence and intelligence through the development, deployment, and support of counter-encryption and electronic analysis.

Tactical Operations Support

- **$1.36 million** and 10 positions (4 agents) to provide the FBI field offices with investigative assistance pursuant to court authorized communication intercepts.

Criminal Division

Cyberterrorism and National Infrastructure Protection

- **$1.18 million** and 14 positions (10 attorneys) to continue coordinating the rising number of investigations and prosecutions of multi-jurisdictional national and international intrusion, denial-of-service attacks, and virus cases.

Infrastructure Improvements

- **$693 thousand** and 1 position to provide increased network security and encryption for the Division's automated infrastructure, and to provide security upgrades to buildings with Division employees.

United States Attorneys

Cybercrime

- **$2.95 million** and 24 positions (18 attorneys) to prosecute hackers and computer criminals who steal intellectual property, copyrighted works, and other trade secrets, embezzle assets using computer technology, and create fraudulent or counterfeit currency, financial instruments or identification documents, or engage in child pornography over the Internet.

COUNTERTERRORISM

Federal Bureau of Investigation

2002 Winter Olympics Support

- **$12.3 million** for travel, lease of vehicles, utilities costs and federal overtime for security and other investigative duties that will help to both preempt and mitigate the potential for terrorist acts that may be directed at this major event.

Security Requirements

- **$2 million** for security requirements necessary to maintain secure environments at various FBI locations.

Incident Response Readiness

- **$17.74 million** and 42 positions (8 agents) to support the FBI's responsibilities relative to advanced render safe activities involving chemical, biological, or radiological improvised explosive devices by terrorists or others.

Criminal Division

Multilateral/bilateral Counterterrorism and Extradition

- **$530 thousand** and 7 positions (3 attorneys) to maintain the elevated pace of extradition and foreign legal assistance work associated with increasing collaborative efforts by intelligence and law enforcement communities.

Anti-terrorism Financing

- **$197 thousand** and 1 position (1 attorney) to fund training and translations needs associated with the Division's anti-terrorism financing program. CRM has provided substantial input and expertise to the interagency effort creating a training curriculum enabling other countries to better detect, deter and enforce laws against terrorist financing. These resources should also enable targeted countries to better assist the U.S. in investigations of terrorist financing.

Immigration and Naturalization Service

Border Management

- **$6.59 million** and 78 positions (20 agents) to establish intelligence units along the Northern and Southwest borders. These units will: collect, analyze, and disseminate information to identify and interdict illegal entrants to the U.S.; monitor terrorist activity and smuggling operations; and track the movement of illicit narcotics, weapons, and other contraband across the nation's borders.

FOREIGN COUNTERINTELLIGENCE

Federal Bureau of Investigation

Counterintelligence Initiative

- **$31.28 million** and 182 positions (62 agents) in counterintelligence resources that will allow the FBI to more completely and effectively assess and defeat foreign intelligence threats to U.S. national security.

Criminal Division

International Security and Terrorism-related Espionage

- **$352 thousand** and 4 positions (3 attorneys) to continue assisting the FBI with investigations involving counterintelligence. Efforts in connection with investigations and prosecutions on behalf of countries known to sponsor terrorism and to illegally procure weapons and strategic dual-use technology from the U.S. have increased. Resources will be used to handle increases in espionage and high tech export violations.

ADDRESSING CRITICAL LAW ENFORCEMENT INFORMATION AND TECHNOLOGY NEEDS

Coordination between law enforcement agencies is crucial to crime solving and criminal apprehension. The pooling of information and resources can greatly increase the efficiency and decrease the time involved in resolving a case. Because law enforcement agencies have developed a reliance on one another for accurate and timely information, it is imperative that our crime fighting agencies maintain up-to-date information systems and develop processes for sharing this information with like organizations.

The Justice Department's budget request includes $369.6 million in additional funding to address these needs, focusing on systems integration, upgrades, network reliability, efficient processes, and state-of-the-art technologies.

Federal Bureau of Investigation

Trilogy and Telecommunications Services

- **$74.16 million** for the second year of Trilogy, FBI's 3-year information technology upgrade plan and to acquire communication circuits that will support faster transmission of data and provide greater network reliability.

Lab Activation

- **$41.16 million** and 22 positions (including $40 million in non-appropriated funds from the Working Capital Fund Unobligated Balance Transfers) for staff to manage the new Laboratory facility in Quantico, and to activate the new Laboratory, and decommission and renovate existing Laboratory space in the J. Edgar Hoover Building.

General Administration

Integration of INS and FBI Fingerprint Identification Systems

- **$28 million** and 7 positions (including $27 million of non-appropriated funding from the Working Capital Fund Unobligated Balance Transfers) to provide for the integration of the INS and FBI fingerprint identification systems. This includes improving the INS fingerprinting capabilities, integrating the INS Automated Biometrics Identification System (IDENT) with the FBI's Integrated Automated Fingerprint Identification System (IAFIS), and improving IAFIS search and response time.

Community Oriented Policing Services

Crime Identification Technology Act

- **$20.69 million** to provide grants assisting state governments in establishing, integrating, or upgrading criminal justice information systems and identification technologies.

DNA Backlog

- **$35 million** to address the backlog of state convicted offender DNA and crime scene DNA samples that exist nationwide.

Crime Lab Improvement Program (CLIP)

- **$35 million** for the CLIP program to improve general forensic sciences capabilities of laboratories. These funds will be used to improve the capabilities of the nation's crime laboratories to more effectively support investigations by bringing the best available science to bear in the investigation of crimes. Resources will be used to award discretionary grants to state and local forensic science agencies in all 50 states to expand and improve their investigative and analytic capabilities in forensic science.

Criminal Records Upgrade Program

- **$35 million** for criminal records upgrade discretionary grants to states to upgrade criminal history, criminal justice, and identification record systems to promote

compatibility among these systems nationwide.

COPS Technology

- **$100 million** for technology grants for state and local law enforcement. This will allow law enforcement to continue to upgrade their technology as they have under the COPS MORE Program, but it will not require them to redeploy officers to qualify for a grant.

Office of Inspector General

Audit Responsibilities

- **$638 thousand** and 6 positions for auditors to cover increased audit responsibilities in the Computer Security and Information Technology arena and for increased coverage of Department contract and grant programs.

REDUCING GUN CRIME

The Justice Department's FY 2002 budget request includes additional funds to vigorously enforce gun laws through increased prosecutorial resources, strategic approaches to crimes committed with firearms, and ensuring that child safety locks are available for every handgun in America. In total, $153.78 million in increased funding is available in the Justice Department's budget request to address gun violence.

United States Attorneys

Project Sentry

- **$9 million** and 94 positions (94 attorneys) for the U.S. Attorneys Offices to establish a new federal-state law enforcement partnership to identify and prosecute juveniles who violate state and federal firearms laws and adults who supply guns to juveniles. This initiative is part of the Administration's "Safe Schools for the 21st Century" strategy, and is in conjunction with Community Oriented Policing Services resources of $20 million.

Community Oriented Policing Services

Project Sentry

- **$20 million** in grants to support state-level prosecutions, establish Safe School Task Forces involving law enforcement community groups and schools, and devise coordinated efforts for reducing youth gun crime in targeted communities. The goal of this program is to prosecute juveniles who carry or use guns illegally, as well as the adults who provide them. This funding will be drawn from existing resources in the COPS

Program ($14.967 million) and Juvenile Justice Title V grants ($5 million), and will be administered in consultation with the Executive Office for U.S. Attorneys. The U.S. Attorneys have an additional $9 million in resources for this project.

Gun Violence Program

- **$49.78 million** to provide grants to encourage states to increase prosecution of gun criminals and to assist them by providing funding to establish programs to target gun criminals through increased arrests and prosecutions and public awareness to deter gun crime. This program will be administered by the Office of Justice Programs.

Office of Justice Programs

Project Child Safe

- **$75 million** will be provided annually for five years in Federal matching funds to ensure that child safety locks are available for every handgun in America. States and local governments will receive $65 million annually to assist in the purchase and distribution of safety locks. The remaining $10 million will go to administrative costs and advertising; including a national toll-free telephone line, to make sure all parents are aware of the program. Funding will be drawn from resources in Juvenile Justice Title V grants ($37 million) and the Juvenile Accountability Incentive Block Grant ($38 million).

COMBATING DRUG USE

The cost of drug abuse to this nation continues to rise even though illegal drug use is down from 20 years ago. This cost is borne by all levels of Americans through tax dollars for increased law enforcement, incarceration, treatment programs, and medical needs. As these costs rise, the U.S. must continue to make the war on drugs a priority. The Justice Department's budget includes funding to increase resources for law enforcement agencies combating drug use, as well as expanding outreach of drug abuse treatment programs for prison populations.

Additional resources for enforcement efforts include funding for technology infrastructure such as DEA's FIREBIRD network, as well as additional resources for mission-critical laboratory work. While law enforcement is an important and effective mechanism in combating the violent crime associated with drug abuse in communities and along our borders, treatment for the individual abuser is also vital. This need is addressed in added resources for residential drug enforcement treatment programs in federal, state and local correctional facilities. In FY 2002, increased resources for combating drug use total $120.56 million.

Drug Enforcement Administration (DEA)

Firebird

- **$30 million** and 3 positions for DEA's global FIREBIRD network. FIREBIRD is DEA's primary information technology infrastructure that provides the office automation support for DEA's global services, and serves as the communications backbone for its intelligence network. This funding will complete FIREBIRD deployment, provide network security, and support technology renewal of the system.

Special Operations Division
Title III Investigative and Intercept Support and Technology

- **$15.06 million** and 62 positions (13 agents) to provide critical support to DEA's Special Operations Division and Investigative Technology programs. These resources will be used to enhance staffing levels in key investigative areas including support for drug enforcement investigations associated with the Southwest Border, Latin America, the Caribbean, Europe, and Asia. This request also funds contract linguist support, as well as resources to enhance investigative technology programs, providing state-of-the-art equipment, technical support personnel, and training.

Laboratory Operations

- **$13.1 million** and 69 positions (46 chemists and $4.1 million for lab equipment) to meet mission critical requirements within the laboratory services program. DEA's forensic chemists provide a variety of essential services, including drug and evidence analysis, onsite assistance for clandestine laboratory seizures and crime scene investigations, and vital court testimony to support prosecution efforts. This request will be used to provide sufficient chemist resources to address a growing backlog of exhibits, and establish a laboratory equipment base that will better support program operations.

Federal Bureau of Prisons (BOP)

Federal Prison Drug Treatment

- **$3.01 million** to expand Residential Drug Abuse Treatment Programs. These resources will increase BOP's drug abuse treatment program outreach by 3,950 inmates.

Office of Justice Programs

Residential Substance Abuse Treatment

- **$11 million** to increase funding for the Residential Substance Abuse Treatment formula grants to $73.86 million in support of drug and alcohol treatment in state and local correctional facilities.

Community Oriented Policing Services

Methamphetamine Lab Clean-up

- **$48.39 million** to continue to help local law enforcement agencies attack the methamphetamine (meth) problem in their jurisdictions. The production and use of meth has risen over the past few years, and the number of meth labs has increased dramatically across the country. Of this total, $20 million will be used to assist state and local law enforcement agencies with the costs associated with meth cleanup, along with $28 million to augment meth enforcement efforts nation-wide.

GUARANTEEING RIGHTS FOR ALL AMERICANS

Through the enforcement of laws and the implementation of programs, the Justice Department has a unique role in guaranteeing rights for all Americans. This role includes promoting the enforcement of our nation's civil rights laws and deterring violent acts against women. Through the efforts of the Civil Rights Division, the United States Attorney Offices, the FBI, and Office of Justice Programs, the Justice Department seeks to protect civil rights and liberties guaranteed to all Americans. The FY 2002 budget includes an increase of $105.72 million to ensure that every American has equal access to opportunities and freedoms.

Civil Rights Division

Criminal Civil Rights Actions

- **$770 thousand** and 12 positions (7 attorneys) to implement the Attorney General's initiative regarding enforcement of the Victims of Trafficking and Violence Protection Act of 2000. These additional resources will be dedicated to implementing the initiative, including increasing prosecutions of persons who violate the Act and outreach to local communities to promote awareness of the trafficking issues.

The Americans with Disabilities Act (ADA)

- **$683 thousand** and 11 positions (3 attorneys) to implement the New Freedom Initiative. These additional resources will be dedicated to implementing the Initiative, including

expanding outreach to small businesses by developing ADA business guidance, increasing accessibility of electronic information technology and ensuring voting process accessibility to persons with disabilities.

Enforcement of the Voting Rights Act

- **$391 thousand** and 5 positions (5 attorneys) to implement the Attorney General's Voting Rights Initiative. These additional resources will be dedicated to implementing the Initiative, including enforcing voting rights as well as education and outreach to state and local governments on the issues of voting reform.

Community Outreach and Education

- **$156 thousand** and 2 positions (2 attorneys) to enable the Division's Office of Special Counsel to increase its presence in businesses and other communities in order to prevent discrimination before it occurs. In addition, these resources will enhance funding for technical assistance to businesses who seek to comply with civil rights laws.

Office of Justice Programs

Violence Against Women Act (VAWA) Programs

- **$102.52 million** and 15 positions to provide additional funding for existing VAWA programs and to create several new programs as authorized under the Victims of Trafficking and Violence Protection Act of 2000. New programs include: $15 million for the Safe Havens for Children Pilot Grant Program; $40 million for the newly authorized Legal Assistance for Victims Crime Program; $10 million is requested for grant funding for the Reduce Violent Crimes Against Women on Campus Program; $5 million for a new Elder Abuse, Neglect and Exploitation Program; $7.5 million for education and training to end violence against and abuse of women with disabilities; and $200,000 to study standards and processes for forensic exams for victims of domestic violence. Furthermore, increases for the VAWA-related Victims of Child Abuse Programs requested in FY 2002 include: $200,000 for a study on the effects of parental kidnaping; $300,000 for child abuse training for judicial personnel and practitioners; and, $500,000 is being requested to increase the Court-Appointed Special Advocate Program.

Traffic Stops by Police

- **$800 thousand** for OJP's Bureau of Justice Statistics (BJS) to support the development of a national statistical program to gather administrative data from law enforcement agencies on the content and consequences of police-initiated stops for motorists for routine traffic violations. In addition, during alternating years, BJS will utilize the Traffic Stops supplement to the National Crime Victimization Survey (NCVS), pilot-tested as a

part of the Police-Public Contact Survey during 1999, to learn about the public's experience with such encounters with law enforcement. These two methods will complement one another and help to identify gaps in agency-level information.

Deaths In-Custody

- **$300 thousand** is requested for BJS to enhance current Law Enforcement Management and Administrative Statistics (LEMAS) collections to capture data on deaths while in law enforcement custody as required under the Deaths in Custody Act. In February, BJS mailed out data collection forms to all local jurisdictions to gather data on calendar year 2000. This funding will be used to complete this initial data collection and allow BJS to initiate quarterly reporting of all state prison authorities and local jail jurisdictions and possibly expand reporting to include municipal lock-up and juvenile counties.

Victimization of Persons with Disabilities

- **$100 thousand** to expand current efforts to measure victimization of the population with disabilities in the United States. This data collection is required under the Crime Victims with Disabilities Awareness Act.

EMPOWERING COMMUNITIES

Both President Bush and Attorney General Ashcroft recognize the value of local communities as a major resource in the fight against crime. By broadening the base of resources available at the local level, communities will be better equipped to provide their citizens with the tools necessary to ensure a safe environment in which their children can grow and learn. The Justice Department's FY 2002 budget requests an additional $30 million to create and expand programs to foster the empowerment of communities. The Department's FY 2002 budget also requests $180 million for school resource officers and school resource officer-related initiatives.

Office of Justice Programs

Weed and Seed

- **$25 million** and 2 positions for the Weed and Seed Program, including $7.5 million to establish 21 new Weed and Seed sites and to support special emphasis areas in existing sites, $2 million for data collection and analysis, and $15.5 million to replace Assets Forfeiture Funds that have been provided for Weed and Seed Program costs over the years.

Federal Bureau of Prisons (BOP)

Federal Prison Faith-based Pre-release Pilots

- **$5 million** for developing faith-based pre-release pilot programs at up to four Federal prisons. These pilot programs will be held at prisons of various security levels and include both male and female populations.

IMPROVING IMMIGRATION SERVICES AND BORDER ENFORCEMENT

The Justice Department is charged with enforcing immigration laws by securing the nation's borders from illegal immigration and by expediting the legal flow of commerce and people into the United States. Coupled with these duties is the Justice Department's role in providing benefits to non-citizens seeking services and ensuring that these services are delivered in a fair, timely, and consistent manner.

The Justice Department is committed to building and maintaining an immigration services system that ensures integrity, provides services accurately and in a timely manner, and emphasizes a culture of respect. In addition, the Department seeks to strengthen border enforcement by increasing the number of Border Patrol agents and force multiplying border enforcement technology. The FY 2002 budget request includes an additional $240.14 million for immigration-related activities.

IMMIGRATION BENEFITS AND SERVICES

Immigration and Naturalization Service

Backlog Reduction

- **$45 million** to eliminate backlogs of benefits processing. This request, combined with $35 million in base funding and $20 million in premium processing fees, is the first $100 million installment in a five-year, $500 million initiative to provide quality service to all legal immigrants, citizens, businesses, and other INS customers, and to obtain a universal six-month processing standard for all immigration applications and petitions. In addition to increased personnel, this funding will provide employee performance incentives, and resources to make customer satisfaction a high priority.

BORDER ENFORCEMENT

Immigration and Naturalization Service

Border Patrol Agents

- **$75 million** and 570 positions for new Border Patrol agents in order to fully implement Congress' five-year plan to increase INS Border Patrol by 1,000 agents each year from FY 1997 through FY 2001.

Integrated Surveillance Intelligence System (ISIS)

- **$20 million** to increase the deployment of intrusion detection technology along the borders. This technology will provide day and night visual coverage of the border, can be deployed in rugged terrain and in vast open areas, and serves as a deterrent to potential illegal border crossers in areas where Border Patrol agents are not immediately visible.

Border Control Construction Projects Underway

- **$42.73 million** to address chronic space shortages faced by the Border Patrol. Many of the INS' facilities were built prior to the 1970's and cannot accommodate the tremendous growth in Border Patrol agents that has taken place since 1994. These resources will be used to address Border Patrol facility deficiencies.

State and Local Assistance

Southwest Border Prosecutorial Resources

- **$50 million** to enhance the prosecutorial resources of county prosecutors located near the Southwest border. Thousands of Federal drug arrests occurring near the Southwest border are referred to county prosecutors because the quantity of drugs seized is too small to meet the threshold set by local U.S. Attorneys for Federal prosecution. OJP will devote $50 million to assist counties near the Southwest border with the costs of prosecuting and detaining these referrals. Grants will be awarded based on Southwest border county caseloads for processing, detaining, and prosecuting federal drug and alien arrest referrals.

United States Attorneys

Habeas Corpus Overload

- **$1.2 million** and14 positions (9 attorneys) to meet immigration workload generated from a rise in habeas corpus petitions filed by detainees being held in INS custody indefinitely.

These detainees have been issued an order of deportation but cannot be removed because their country of origin will not accept them. Many detainees challenge the legal authority of the INS to hold them by petitioning for a writ of habeas corpus.

Office of Inspector General

Southwest Border

- **$1.36 million** and 9 positions for investigators to address corruption and civil rights violations involving Department employees along the Southwest border.

Executive Office for Immigration Review (EOIR)

Coordination with INS Initiatives

- **$4.85 million** and 59 positions to coordinate with INS initiatives, which are anticipated to increase annually the Immigration Judge caseload and the Board of Immigration Appeals caseload by 10,000 cases. These resources will enable EOIR to support anticipated caseload increases.

REDIRECTION OF STATE AND LOCAL RESOURCES

The FY 2002 budget provides over $4.2 billion for state and local law enforcement grant programs. Programs that will be created or enhanced in this budget to address specific crime problems include proposals to: increase Violence Against Women Act funding by more than 35 percent; substantially enhance Weed and Seed program funding; provide more drug treatment in state prisons; undertake new initiatives to help prosecutors; and address gun violence.

The FY 2002 budget lowers the Department's total grant program funding, primarily in four areas:1) Byrne discretionary grants; 2) State Criminal Alien Assistance Program (SCAAP); 3) Local Law Enforcement Block Grants; and 4) Prison Grants. Overall, funding is reduced from approximately $5.2 billion to $4.2 billion.

The FY 2002 budget lowers state and local law enforcement grant funding from its FY 2001 level by reducing or eliminating funding for several programs that have fulfilled their original purpose, programs that were funding items already being funded elsewhere in the budget, or programs that were awarded on a non-competitive basis. The reduction in state and local grant funding will allow for funding increases to meet federal law enforcement agency priorities.

Attorney General ASHCROFT But dollars tell only a small part of the story, because voting rights are also a critical civil right. We've sent monitors to elections in St. Louis and Federal observers to Cicero, Illinois, to ensure that the right vote—the right to vote, pardon me—and to preserve the integrity of the voting process, those objectives are guarded.

Just yesterday, we dispatched six observers to monitor municipal elections in Mississippi under the Voting Rights Act. In addition, we carefully are monitoring both State and Federal election reform initiatives. We're working to help small businesses better accommodate persons with disabilities under the President's New Freedom initiative, and we are stepping up prosecution of those who traffic in human beings, those who would not only traffic in them but exploit them for their labor, particularly those who bring the approximately 50,000 women and children into the United States each year.

Another issue that has frequently come up in my conversations with many of you is immigration reform. The President's budget requests an additional $240 million to beef up INS enforcement activity and to help local prosecutors. The administration will also propose splitting the mission of the INS in two, with separate chains of command reporting to a single policy official. I support splitting the agency in two as a way to draw a bright line between the need to deter illegal immigration and the ability to assure the millions of legal immigrants and new citizens the smooth and orderly service they deserve. I look forward to working with Members of this Committee as this proposal is advanced.

Looking ahead, the priorities of the Justice Department will continue to be dictated by our commitment to first principles. Gun violence, violence against women, and drug crime all threaten to deny the most fundamental right of our citizens, the right to personal safety.

There is no question that we need a renewed commitment to the vigorous enforcement of existing laws addressing gun violence. The recent incidents in our schools highlight the need for the collaboration among Federal, State, and local law enforcement agencies to combat juvenile gun violence. We have already taken steps to accomplish this by devoting increased resources to prosecutions, developing these collaborative approaches, and by working to ensure that child safety locks are available for every handgun in America.

And to those who despair of fighting to reduce illegal drug use, I have a very simple message today: I don't share the pessimism. The Department of Justice is committed to a vigorous, sustained effort to reduce drug abuse. Our kids are too important for us to accept defeat when it comes to drugs.

Finally, I'd like to say a word about a critical need that underlies all of these efforts protecting and promoting the integrity of our system of justice. As you know, Attorney General Reno undertook a review last year of the Clinton administration's enforcement of the Federal death penalty. Her review of nearly 700 capital cases found that there is no evidence of any racial or ethnic bias in the Justice Department's decision-making process in Federal death penalty cases.

Since my arrival at the Department, we have undertaken an additional study of the administration of the Federal death penalty. We conducted an analysis of the original 700 cases and approximately 250 additional capital cases that were never submitted to Attorney General Reno's original review. Looking at these 950 cases, we evaluated Federal enforcement policies and practices to determine whether there was any evidence of bias in the system and what types of capital cases fell within Federal jurisdiction.

Later today, the Department will be releasing our full analysis of the Department of Justice's enforcement of the death penalty over the past several years. Our conclusion is, as the Reno study concluded, that there is no evidence of racial bias in the administration of the Federal death penalty.

The Reno study concluded and our analysis has confirmed that black and Hispanic defendants were less likely at each stage of the Department's review process to be subjected to the death penalty than white defendants. In other words, United States attorneys recommend the death penalty in smaller proportions in the submitted cases involving black or Hispanic defendants than in those involving white defendants.

The Attorney General's Capital Case Review Committee likewise recommended the death penalty in smaller proportions of the submitted cases involving black or Hispanic defendants than in those cases involving white defendants. And the Attorney General made the decision to seek the death penalty—because ultimately these decisions are made by the Attorney General—the Attorney General made the decision to seek the death penalty in smaller proportions of the submitted cases involving black or Hispanic defendants than in those cases involving white defendants. In the cases considered by Attorney General Reno, she decided to seek the death penalty for 38 percent of the white defendants, 25 percent of the black defendants, and 20 percent of the Hispanic defendants.

The finding that the death penalty was sought at lower rates for black and Hispanic defendants than for white defendants held true both in interracial cases involving defendants and victims of the same race and ethnicity and in intraracial cases involving defendants and victims of different races or ethnicities.

The full details of this study will be available later today.

In addition to looking at statistics regarding race, today's study also examines and explains why the Federal Government's interests in punishing certain types of murders, such as those committed by drug kingpins, Federal prisoners or terrorists, result in a pool of criminal defendants being charged and tried in the Federal system. It is this category of murders that you and Congress have identified as being grievous enough to warrant the death sentence, and it is the Department's responsibility to protect those Federal interests as expressed in the law enacted by Congress, signed by the President.

I'm also announcing today some important revisions to the Department's death penalty protocols. Attorney General Reno instituted a series of protocols designed to ensure consistency in the treatment of death-eligible cases, and I have operated under the same protocols since I became the Attorney General.

Under these protocols, in all cases charged as death-eligible cases, the relevant United States attorney makes a recommendation to the Department. The case is then reviewed by a Committee of career attorneys who seek input from both the U.S. attorney and defense counsel. The Committee evaluates the facts of the case, the Federal interest in the case, the likelihood of success, and the aggravating and mitigating factors that Congress has identified as relevant in such cases. The Committee then makes a recommendation to the Attorney General.

The case is then reviewed by attorneys in the Department's office, in the Attorney General's office, and then by the Attorney General.

The advantage of this approach is that a uniform, equal process governs, and ultimately one person reviews all cases nationally to ensure a consistent treatment based on the alleged conduct of the defendants, not other factors.

As I have already noted, both Ms. Reno's study and our own studies have concluded that there is no evidence of racial bias in the Department's treatment of minorities in this system. We did note a slight statistical disparity in the treatment of plea agreements. This is the one component of the process that is not subject to subsequent review under the current protocols. A plea agreement can be entered into at the local level without a superintending review or analysis or evaluation at the Department of Justice.

I am announcing today that in order to have greater consistency in all aspects of the application of the Federal death penalty, I am changing the protocols to require prior approval by the Attorney General before a capital charge may be dropped in the context of a plea agreement. I am also directing United States attorneys to report all potential death-eligible cases to the Department so that our data will be more complete.

In addition, to conserve the expenditure of both government and defense resources, I am simplifying the procedure for reviewing cases in which the U.S. attorney is not recommending the death penalty. This will allow more attention to be given to cases where the death penalty is being pursued. It is my hope and expectation that this new protocol will strengthen our ability to fairly and impartially administer the Federal death penalty.

I am pleased with the studies that the Department has done. Attorneys in both the last administration and in this one have worked hard evaluating these cases and have come to the conclusion that there is no racial basis in the way we are administering the death penalty in the Federal system. I am confident that, like my predecessor, Ms. Reno, this is the appropriate conclusion.

I also share her view that there is no question about the guilt of any of the 21 individuals currently on death row in the Federal system. They have committed grievous crimes that the people of America, through you their elected representatives, have determined warrant the death penalty. It is my responsibility to enforce those laws and to administer that penalty.

Still, public confidence is an essential component of the administration of justice. Accordingly, in order to ensure public confidence and guarantee that our future efforts in the enforcement of the

Federal death penalty are consistent with the high standards of fairness that are required in charging, trying, and sentencing those accused of Federal death-eligible murders, I am directing today that the National Institute of Justice initiate a study of how death penalty cases are brought into the Federal system. I'm also directing the National Institute of Justice to study the effectiveness of Federal, State, and local law enforcement in the investigation and prosecution of murder in America and whether there is sufficient accountability for murder, the most heinous of crimes. By understanding more about past practices in these areas, we may have an opportunity to improve our performance in the future.

And finally, the demands placed upon our Federal Bureau of Investigation have grown dramatically in response to the sophistication and globalization of crime. At the same time, legitimate concerns have been raised with regard to the management and administration of justice at the FBI.

Two weeks ago in testimony before an Appropriations Subcommittee of this House, FBI Director Louis Freeh announced a series of reforms to improve FBI recordkeeping and document management. These reforms are a necessary step in preserving the people's trust in our system of justice. We cannot and I will not allow our FBI's reputation or the reputation of any of our law enforcement institutions to be tarnished.

It is the responsibility of all of us to see that equal and impartial justice applies to all Americans; and this is a responsibility that I take seriously, and it's an honor each day to serve the Nation in respect to this objective.

Mr. Chairman, I thank you for this opportunity and I look forward to responding to the questions of the Members of this Committee.

[The prepared statement of Attorney General Ashcroft follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN ASHCROFT

Mr. Chairman, thank you. It's both an honor and a privilege to be here today to discuss the programs and activities of the Department of Justice.

As a former Judiciary Committee member myself, I'm always pleased to see the authorizers seeking to assert themselves. It's been over twenty years since the last comprehensive authorization for the Department of Justice was enacted. To put that in perspective: twenty years ago I was attorney general of the state of Missouri. Today I'm Attorney General of the United States. Progress can take time, but it is possible.

I commend you for your work here today. The responsibility for the United States system of justice is nothing less than the responsibility for freedom. And to carry the weight of such a responsibility is a rare privilege in the history of human affairs.

Of course, the weight of my responsibilities is giving me a good workout these days. I have inherited a department with 125,000 employees who I am meeting one-by-one, an alphabet sea of acronyms I am slowly coming to decipher, and a law enforcement mandate that is both humbling and inspiring.

The United States Department of Justice today is dedicated to a single proposition in carrying out this mandate: the energetic enforcement of the rule of law, including protecting the civil rights of all Americans.

Over the past several weeks I have had the privilege of meeting informally over coffee and orange juice with many of you to listen to your concerns and to discuss advancing the cause of justice. To date, I think I've met with about half of you, and I look forward to visiting with the remaining members in the next several weeks. I've been pleased to find that the priorities that you've expressed to me closely reflect my own priorities.

We share a respect for the rule of law and the defense of people and property that it requires. And we share a respect for the enforcement of civil rights and the cultivation of human potential that such respect permits.

As Attorney General, I have no higher priority than protecting the civil rights of all Americans. When racial unrest erupted in Cincinnati last month, the Department of Justice responded immediately, working with the mayor and other community leaders to help restore calm. On the streets of Cincinnati and elsewhere, our message—echoed in everything that we do at the Department—is that government judging its citizens on the basis of their race is wrong and must not stand.

The President has asked me to assess the extent and nature of one such form of discrimination—racial profiling—and to report back to him with my recommendations. To make good on our commitment to improve the just and equal administration of our nation's laws, our 2002 budget increases funding for our Civil Rights Division to nearly $101 million—an increase over FY 2001 of 9.7 percent.

But dollars tell only a small part of the story. Because voting rights are also a critical civil right, we've sent monitors to elections in St. Louis, Missouri, and federal observers to Cicero, Illinois, to ensure the right to vote and to preserve the integrity of the voting process. Just yesterday we dispatched six observers to monitor municipal elections in Mississippi under the Voting Rights Act. In addition, we are carefully monitoring both state and federal electoral reform initiatives.

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Another issue that has frequently come up in my conversations with many of you is immigration reform. The President's budget requests an additional $240 million to beef up INS enforcement activity and to help local prosecutors.

The Administration will also propose splitting the mission of the INS in two, with separate chains of command reporting to a single policy official. I support this proposal as a way to draw a bright line between the need to deter illegal immigration and to assure the millions of legal immigrants and new citizens the smooth and orderly service they deserve. I look forward to working with members of this committee as this proposal is advanced.

Looking ahead, the priorities of the Department of Justice will continue to be dictated by our commitment to first principles. Gun violence, violence against women, and drug crime all threaten to deny the most fundamental right of our citizens: the right to personal safety.

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Finally, I'd like to say a word about a critical need that underlies all of these efforts: protecting and promoting the integrity of our system of justice.

The demands placed on our Federal Bureau of Investigation have grown dramatically in response to the sophistication and globalization of crime. At the same time, legitimate concerns have been raised with regard to the management and administration of justice at the FBI. Two weeks ago, in testimony before an Appropriations Subcommittee of this House, FBI Director Louis Freeh announced a series of reforms to improve FBI record keeping and document management.

These reforms are a necessary step in preserving the people's trust in our system of justice. We cannot—and I will not—allow our FBI's reputation—or the reputation of any of our law enforcement institutions—to be tarnished. It is the responsibility of all of us to see that equal and impartial justice applies to all Americans. And this is a responsibility that I take seriously, and seek to honor each day of my service to this nation.

Mr. Chairman, thank you. I look forward to responding to your questions.

Chairman SENSENBRENNER. Thank you very much, General.

Before we beginning the questioning of the Attorney General, I would like to make several housekeeping announcements. By my

count, we have 145 minutes worth of questions if all of the Members present at this hearing utilize their full 5 minutes. The Attorney General has another engagement a little bit after 5 o'clock this afternoon, and dividing the time that is available into when the Attorney General has to leave will require the Chair to strictly enforce the 5-minute rule. So everybody on both sides of the aisle should be on notice that when the red light goes on, we have to move on in order to allow everybody who is here to ask some questions.

Secondly, as the Attorney General has mentioned in his statement, it has been over 20 years since the Department of Justice has been authorized by law. That is clearly unacceptable, and the Committee will consider an authorization bill soon. This bill will largely address budgetary, administrative, and management issues. A draft bill has been circulated to the minority and to the Department, and there has already been one bipartisan staff meeting on this legislation and there undoubtedly will be more.

To facilitate the Committee's understanding of the Department's needs, we will be submitting questions for the record in two groups. I would request that all Members on both sides of the aisle submit to Mr. John Mautz, who is seated to my right, questions regarding the budgetary, administrative, and management issues no later than the close of business tomorrow, Thursday, June 7, 2001. We will ask the Department to expedite its responses to those questions so that the Committee may have the benefit of the answers prior to the markup on the authorization bill.

All other questions should be submitted to Mr. Mautz no later than the close of business, Monday, June 11, 2001. I appreciate all Members' attention to this request. Questions submitted after these deadlines will not be presented to the Department nor included in the record.

This relatively quick time line is necessitated by the fact that we wish to be able to mark up an authorization bill and get this Committee's oar in the water before the Appropriations Committee decides to do this work for us. So I would hope that the Members would cooperate with the time deadlines.

And now I'll begin the questions by yielding myself 5 minutes.

General Ashcroft, I am delighted to hear of the administration's once-again report that we do intend to receive legislation reorganizing the Immigration and Naturalization Service and that there will be a budget increase of approximately $240 million to the INS, largely channeled toward better enforcement of our borders, which is something I support. However, I am concerned that the service function, or the paperwork function, in processing the petitions filed by those wishing to comply with our laws will be treated as a stepchild in terms of the budget for this reorganized agency.

I have two questions. First, when can we expect to get the legislation splitting the INS in two; and second, what does the administration propose to do so that the INS has enough money to professionally and speedily deal with the petitions that it receives from those people who seek legalized status?

Attorney General ASHCROFT. I am not able to tell you an exact date upon which we would be prepared with a proposal. As a matter of fact, I think it would be appropriate for us to confer together

about a proposal. The expertise of the Members of this Committee, particularly some that have invested themselves thoroughly over the course of decades in evaluating this, is an important component of a plan.

The President has clearly recognized the need to separate the functions, because I think there is a sense that those who are legitimately in the country and are awaiting process and the change of their status are frequently at the end of a very long line. That's simply one of the problems. So I can pledge to work closely with you.

We are hoping to have a new Director of the INS, whom we would like to involve in helping report the participation of the Agency in the development of the proposal for reform; and we are eager that his nomination be made complete and that his confirmation place him in a position to assist us with this understanding. You know, the President has stated targets about moving the time for processing cases downward, because he understands the very serious dislocations in the lives of individuals; but I cannot give you a specific date upon which we would provide legislation. We would like to do that in conjunction with those of you that have expertise here.

Chairman SENSENBRENNER. What about the budget question? Will there be an appropriate increase in the resources for the service end of the reorganized INS, as well as in the enforcement end? I think you would find support on both sides of the aisle for more money for both.

Attorney General ASHCROFT. Well, the backlog is a major priority for the administration. We need to welcome immigrants with something other than a big line, and this requires $100 million in funding for the year, fiscal year 2002, with similar funding devoted to the effort in the years, fiscal years 2003 through 2006.

In fiscal year 2002 a program enhancement of $45 million is requested. This request, combined with the $35 million in base funding and $20 million in fees, would provide INS with the first installment of the 5-year $500 million initiative to obtain a universal 6-month processing standard for immigration applicants and petitions.

Frankly, that's a very ambitious aspiration, but it's the kind of aspiration that we ought to have. We have people who are simply being displaced in their lives unduly because of the delays now. So the funding request is made in the budget submission, and I believe it is important to have the separation in the agencies so that, as a matter of fact, we don't have an inordinate devotion of resources to enforcement and an inadequate devotion of resources to service.

Chairman SENSENBRENNER. My time has expired.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I am very sorry that you couldn't have sent up the death penalty study before you decided to come here and announce it. Not one Democrat on this Committee has seen or heard anything about it. So this unilateral presentation, which doesn't include any data on State death penalty matters, where most of the executions take place—and incidentally, I remind you that there is a constitutional

question that the Department of Justice has affirmed—instructed us years ago, and so this unilateral presentation means nothing to me, nothing till we see it. It's an unfair way to present a matter as serious as the death penalty.

Now, I hope that you can think about your relationship with Ronnie White. That's a Department of Justice matter that the Attorney General is responsible for.

Now my next question to you is, have you or any member of your staff ever discussed Senator Torricelli's case with anyone employed by the White House, a Republican Senator, a Republican Congressman or his or her staff, or any employee of the Republican National Committee?

Attorney General ASHCROFT. Congressman, shortly after I became Attorney General of the United States, I recused myself from any involvement in the Torricelli matter. The reasons for that I think are pretty well understood. I served with the Senator in the United States Senate, and as a result, I don't have any responsibility as it relates to that matter.

The matter is undertaken and conducted by a U.S. attorney who is a holdover from the previous administration, and any inquiries regarding that matter and any decisions regarding that matter will have to be reached and made by——

Mr. CONYERS. Mr. Attorney General, can you answer this question yes or no?

Attorney General ASHCROFT. Have I ever mentioned the Torricelli matter to anyone else? Yes. I just mentioned it to you here in the Committee; and obviously I've mentioned it to people when I was a Member of the Senate when the item—items have come up.

Mr. CONYERS. Now, did you remember me asking you if you had any contact with anybody in the White House about this matter, or your staff having any contact with anyone in the White House about the matter?

Attorney General ASHCROFT. I do remember you asking me that.

Mr. CONYERS. And what is your response?

Attorney General ASHCROFT. I don't know.

Mr. CONYERS. You don't know. Can you find out?

Attorney General ASHCROFT. I don't know whether I can find out.

Mr. CONYERS. You don't know whether you can find out.

Attorney General ASHCROFT. That's correct, sir. You've asked.

Mr. CONYERS. Okay. That's fine. That's all I need to know.

Now, this is the May 27th New York Post article, "Torch is Toast, Feds, We have enough evidence to indict New Jersey Senator Torricelli," dated Sunday, May 27, 2001. Now, it quotes a Justice Department investigator saying, "We're going to indict him soon."

This appears, Mr. Attorney General, to violate rule 6(e) of the Federal Rules of Criminal Procedure. Are you aware of that?

Attorney General ASHCROFT. Am I aware of rule 6(e)?

Mr. CONYERS. And will there be an investigation about this matter?

Attorney General ASHCROFT. I will direct any requests for anything related to the—to the matters you have indicated to those in the Justice Department whose responsibility it is to address these,

in light of my recusal which took place shortly after I became Attorney General.

Mr. CONYERS. Boy, oh, boy.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman. I have no questions. I just want to congratulate General Ashcroft on becoming Attorney General and for your very prudent selection of staff that I see behind you. Thank you.

Chairman SENSENBRENNER. Well, I may quarrel with that since that was mostly the staff that I inherited.

The gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

And thank you, General Ashcroft, for being here. As a former Senator and in my own role as somebody who once aspired to that, I assure you I will not take you through the confirmation process a second time today.

The question I have really centers around much of what your presentation was, but maybe a different angle on it. The whole question of racial profiling, I think, is something that you have spearheaded from day one, and I know the President has shown a keen interest in really working on significant reform; and I want to thank you both for that. But I want to lead you down a little different avenue than you may already be going down, and that has to do directly with my territory and with some life experiences that I've had and that others around me have had.

As you know, it is appropriate for the Border Patrol to have some leeway in their process; but excluding the border activities at the border, it would seem that it is unacceptable to use racial profiling to decide whom to stop among citizens and noncitizens alike here in America, and I have two examples for you here today.

First of all, as you may know, I am an Arab American, so this one hits very close to home. February 12, 1997, a report that came from the White House, signed by the President, that is often called "the Gore report"; and it specifically is titled "Airline Safety"—actually, "Commission on Aviation Safety and Security"—as I say, known as the Gore report, and it seems to have been the catalyst for this first event.

A certain individual, whose name Nabil Shurafa, S-H-U-R-A-F-A, 18-year-old high school student going from—on a Northwest Airlines flight from Cincinnati to conduct a rowing—high school rowing national event, was pulled off, removed from the flight, his bags searched and the only answer he was ever given, this was an American, son of a physician, on a domestic flight, was that he fit a profile.

This isn't an isolated incident.

The next example is probably more directly related to my district. My district has two checkpoints, each approximately 70 miles inland from the U.S.-Mexico border along two major freeways, the I-5 and the I-15. This carries millions of passengers per year. These checkpoints, although constitutional, and have operated for many, many years are now routinely used in the process of racial profiling.

This wouldn't be brought home as clearly as it has been if I myself hadn't been stopped and if both my Hispanic district manager and my Asian district manager didn't find themselves more routinely stopped than others. They're stopped because they fit a profile, a profile that does coincide with many of the most common illegal entrants to our country, but also coincides with much of the demographics of southern California and many of the people whom I have worked with for years and who have worked for me and my company.

I know the President has asked you—has sent a directive to begin checking on racial profiling in the Departments of Treasury, Interior, and Justice and I would hope that that report would be the beginning of your investigation into ways to enforce our laws, including border-related laws, but at the same time respect that once someone is here, citizen or not, and is well inside our borders, they should enjoy the same constitutional rights of not being unreasonably detained simply because they fit a given name or given color of their skin.

And I would like to leave the remainder of the time for you to comment on any part of my question, because I think you deserve that opportunity.

Attorney General ASHCROFT. Well, first of all, I thank you for bringing this matter to the attention of not just the Justice Department.

For the American people, the checkpoints that are interior to the country do play a key role as a second line of defense and a deterrent to illegal immigration. But, you know, my view is that we need to find ways to avoid profiling, period, racial profiling. And some people might say, well, it's tougher to enforce the law.

Well, it may be tougher to enforce the law, but we have got to respect people for who they are and what they are, not for their ethnic identity; and I believe that it's wrong to racially profile as basis for law enforcement. We will do what we ought to do and what is necessary to address the issue.

Part of the studying that we're doing now is to study what's happening in the Federal community. And, you know, the President has asked us and asked you to be involved in developing the right information about what's happening in the non-Federal community. But we take care of the Federal community items first, and we will work hard to do that. We need to both in a racially neutral environment for enforcing our laws, immigration and otherwise.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. CONYERS. Mr. Chairman, can Mr. Frank go?

Chairman SENSENBRENNER. The gentleman from Florida Mr. Wexler.

Mr. WEXLER. I would be happy to—okay.

Mr. Attorney General, I too want to welcome you to the Committee, and first, I would like to express my sincere appreciation to you and the manner in which you have exercised your responsibility with respect to the McVeigh case. I think for this, the delay and the confusion has created an enormous, tortuous degree of tension with respect to the families, but I think your conduct of the case in a cautious but forthright manner to achieve the finality of justice with respect to McVeigh is greatly appreciated by an over-

whelming number of Americans, even though they may ultimately have questions about the death penalty itself.

If I could ask my question, however, on a different matter, I am privileged to represent Palm Beach and Broward Counties in the State of Florida. This week, through the final draft document, as it has been reported in the Washington Post and other news organizations, the United States Commission on Civil Rights has concluded, at least in that draft final document, that the conduct of the Florida 2000 presidential election was marked by, and I quote, "injustice, ineptitude, and inefficiency." and I think the statistic that stands out that should quantify for all Americans the extent of that injustice and ineptitude is the fact that 54 percent of the votes, 54 percent of the votes that were rejected during the Florida presidential election were cast by African American voters, even though African American voters only account for 11 percent of the votes in Florida.

So 54 percent of the discarded votes were African Americans, even though they are only 11 percent of the voting population.

It's my understanding that the Commission chairperson, Mary Frances Berry, will ask you, as the Attorney General, to investigate whether the obstacles encountered by minority voters in the Florida 2000 presidential election constituted a violation of their 1965 Federal Voting Rights Act; and I was wondering if you could commit to the Committee today on what actions you will take to follow the investigation of the United States Commission on Civil Rights.

Attorney General ASHCROFT. Well, first of all, let me say that I think the right to vote is at the very core of who we are as a nation and as a people, and it is a right that inures to every American. And it's a matter of great concern to me and the Department of Justice that we provide every assistance to making sure that right is realizable by each citizen.

There were a number of allegations that were delivered to the Department of Justice at another time. And I believe it is public information that we have, and I hope I am not stating the wrong number. I am under oath so I'm trying to speak carefully. I think we have 12 investigations that remain open at this time, so that we are in the process of responding to allegations about the last election.

I will be very pleased to get a copy of the report when it is released and to evaluate it, and I will pledge that the Department of Justice will cooperate to seek to enforce the law and to assess compliance with the law in accordance with its responsibilities to enforce the law and to require compliance with the law.

Mr. WEXLER. Is the Department investigating the process in which hundreds, actually thousands, of people were purged from the voter registration lists in Florida?

Attorney General ASHCROFT. I'm not at liberty to define the nature of the investigations of the 12 investigations that are under way.

Mr. WEXLER. Well, would you agree that in general—in general, then, that if there were allegations that people in any State were inappropriately purged from the voting registration rolls before a Federal election, and that then the United States Commission on Civil Rights found that to be a problem, that that should be an

area in which a United States Attorney General should investigate?

Attorney General ASHCROFT. That would be a matter of great concern to me, and violating the law in that respect would certainly be a basis for and should prompt an Attorney General to look into it.

Mr. WEXLER. Thank you very much.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Florida, Mr. Keller.

Mr. KELLER. Good afternoon, General Ashcroft. I too am from Florida. I think the election came out okay myself.

Let me begin by just saying that in my view, my humble opinion, I think you are about the single most qualified person ever to hold the position of Attorney General in our history, and I very much appreciate your willingness to take on this challenging job, first; and second, to come here before this Committee and subject yourself to tough questions from folks much like me. So I appreciate your hard work.

The first question has to do with cable television in Federal prisons. Currently, Federal prisoners, including violent criminals like Timothy McVeigh, enjoy perks like cable TV and HBO. The taxpayer money pays for the basic cable portion, and the prisoners can team money that pays for the HBO Showtime portion. The source of this is the Federal Bureau of Prisons own Web site, bop.gov.

I personally believe that this is a waste of taxpayer dollars, and I've filed a bill called the No Frills Prison Act to stop it.

My question to you is, would you review the Federal Bureau of Prisons rules and regulations on this matter to determine if using money for cable TV for these Federal prisoners is an efficient use of taxpayer dollars?

Attorney General ASHCROFT. Well, I thank you for your question, and I'm sensitive to the—to the issues you raise.

I would always be willing to review the expenditures of the Bureau of Prisons with a view toward assessing whether or not they achieve the objectives that we want to achieve in our prison system; and as a result, that would be true about whether or not we have the right opportunities for information and, quote, "entertainment." I don't think of our prisons as entertainment centers, and appreciate your remarks.

Mr. KELLER. The second area I want to chat with you about, my final area, has to do with civil lawsuits brought by the Department of Justice against major employers such as Microsoft, Wal-Mart.

A few days ago, May 25th, the New York Times reported that the United States Government brought a landmark lawsuit against Wal-Mart, and essentially what happened is, Wal-Mart is a retailer that sells exercise equipment—doesn't have anything to do with making it or manufacturing it or designing it—and evidently the equipment was somehow defective, and the U.S. Consumer Product Safety Commission, through the Department of Justice, filed this landmark suit saying even the retailer, this major employer, should pay, as a result of these injuries, certain fines.

I'm concerned about this type of suit in light of the fact the Department of Justice complains they don't even have the money to enforce criminal laws and, yeah, now they're bringing suits against

major employers that provide hundreds of thousands of jobs. I talked to the Wal-Mart folks, and they said they found out about this through the press conference. They weren't even told about this before they heard it from a reporter.

So my first question is, in the future, what policy, if any, will you establish to ensure that at least defendants find out about lawsuits from the Department of Justice rather than from a news reporter?

Attorney General ASHCROFT. I thank you for bringing this matter into the arena of discussion. I find it—what we want to do in the Justice Department is to help provide a context for justice in the culture, and we need to help people avoid injuries. But I think we need to cooperate whenever we can to do that, and to the extent possible I think it's important for us to indicate to companies that we are displeased in some measure with their performance as it would relate to the legal requirements they have and to do so in a way which allows them to be responsive. So I would look forward to providing information to individuals in advance of their finding out about matters like this from the news industry.

Mr. KELLER. Well, this is kind of a precedence-setting suit by the press release put out by the government. This is the first time, they brag, they have ever sued a retailer who didn't have anything to do with the manufacture of the product. And I'm wondering what process, if any, will you follow to ensure that these type of precedent-setting lawsuits against businesses are given the proper level of review and approval within the Justice Department before they're filed.

Attorney General ASHCROFT. Well, I just have to indicate to you that the review of lawsuits filed by the Justice Department normally takes place under the direction and leadership of the Assistant Attorneys General who are appointed by an administration, and to date we have some of those confirmed and in place by the United States Senate. And, regrettably, there are still a number of areas in our Department that are not supervised by such individuals confirmed by the Senate as a result of Presidential appointment.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Massachusetts, Mr. Frank.

Mr. FRANK. General, one of the most important things Bill Clinton did for human rights was to reverse a 40-year-old policy that said if you were gay or lesbian you could not get a security clearance. He issued an executive order that changed that. And I—you and I have had a chance to discuss this some before, but I did think it was important to make it clear publicly.

When you testified at the confirmation hearing you said that you were unfamiliar with that particular issue, and you then did clarify. I would like to ask you to do this now, because it's very important for all the people—security clearance doesn't just apply to people who work in the Federal agencies that deal with security but for private sector companies that work with them. We've had a history of people being subjected to very intrusive questions.

And I should note I've checked with the intelligence people, we have no cases that I'm aware of where people betrayed the country because they were gay or lesbian. Indeed, as I have reviewed the major cases of espionage, the people who committed it were all het-

erosexual. I draw no inferences about heterosexuals based on that, I want to assure people, but I just mention that as a fact.

So I would ask you, could you now reaffirm that the policy of the United States Government will continue to be that sexual orientation will not be a reason for denying someone a security clearance?

Attorney General ASHCROFT. Congressman Frank, during my confirmation hearings I did say as Attorney General I would not make sexual orientation a matter to be considered in hiring or firing and that I would continue the policy of the previous administration regarding the sexual orientation of all employees and potential employees; and I confirm that.

The Department of Justice, the FBI, and every other component of the Department does not now discriminate on the basis of race, color, religion, sex, national origin, disability or sexual orientation. The sexual orientation of a candidate for employment is not a condition upon which weight is given in the Department of Justice or in any of its components.

Mr. FRANK. Thank you, General, but I'm not quite persuaded to apply for a position. But I am glad to hear that.

I would like to make it explicit, though, that that also includes security clearance, because security clearance does cover not just simply employees of the Federal Government but people who would be the employee of an architectural or engineering or other firm dealing with DOE or DOD. So is that part of the policy also being continued?

Attorney General ASHCROFT. There has been no change in policy. I have ordered none and have no intention of ordering any.

Mr. FRANK. So the sexual orientation will not be a reason, absent some other complicating factor, to deny a security clearance.

Attorney General ASHCROFT. The policy remains unchanged, and I have no intention and will not change it.

Mr. FRANK. That is the policy. A "yes" would make a lot of people——

Attorney General ASHCROFT. Yes.

Mr. FRANK. Thank you, General.

The next question has to do with immigration. You inherit a policy that's more, I think, the fault of the Congress of the United States than anybody else, but I hope we could collaborate in changing it. We have people who are in prison, in effect for the rest of their lives, because we cannot deport them to a country that will accept them. That is, there are people, some of whom committed minor crimes, some of whom—and I was discussing these yesterday with my colleague from Florida, Mr. Diaz-Balart. Some of the marielitos who are fleeing the oppression of Castro because of some problem cannot be sent back to Cuba, face lifetime imprisonment.

That seems to me, of all the things we, the United States Government, do, one of the least justifiable. Could you agree that we should be working together to find a way to release from lifetime detention people who have never committed a crime that remotely justifies that degree of detention and are in prison in large part simply because there is no country that can take them back?

Attorney General ASHCROFT. I can, and I'm grateful for your sensitivity to this. I think it's something that shocks the conscience of individuals. There are about 3,000 long-term detainees in INS, if

I'm not mistaken. I hope I have the numbers right. A little less than 400 of them have committed no offense.

Now, there is a process for INS to evaluate them in terms of whether they would stay in touch with INS if they were released. There is a release process. But, very frankly, no pun intended, Congressman Frank, I would welcome the opportunity to work on this.

Mr. FRANK. Thank you. I will hope to work with you.

Last point. You won't have time to answer, but the Justice Department through the FBI was forced to admit that an agent of this government, an FBI agent, misled a Federal court in a way that led to the harsh incarceration of Wen Ho Lee. Now that's acknowledged, that an FBI agent gave false testimony. We don't know whether it was his fault or somebody else that misled him. I twice spoke to Mr. Freeh and was disappointed, frankly, to get a kind of runaround.

There needs to be some accountability for this explicit and acknowledged misrepresentation regarding Wen Ho Lee. The FBI is in total control of the facts. It happened well over a year ago, and I hope that you will direct the FBI to deal with this because it is, in fact, very important.

Attorney General ASHCROFT. Thank you.

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Attorney General, I'd like to use my first question to try to dispel a myth and it is this: To the best of your knowledge, isn't it true that a nonviolent first-time drug offender who has been apprehended with a very small quantity of drugs simply never goes to prison? The myth is that a lot of people are in prison today who are first-time offenders with small quantities.

Attorney General ASHCROFT. I tend to, while under oath, hesitate to make sweeping generalizations that they never go to prison. So I would say it would be rare, at least in a lot of jurisdictions, for the first offender in these settings to do prison time.

Mr. SMITH. So it could be rare. It would be the exception.

Attorney General ASHCROFT. Including the Federal system.

Mr. SMITH. Thank you.

Mr. Attorney General, the last administration made little or no effort to prosecute distributors of obscene materials. In fact, I'm not aware of a single case that was prosecuted. Does your Department and is this administration going to have a different record from the last administration?

Attorney General ASHCROFT. Well, I would indicate to you that I believe that the laws of this country are to be enforced. One of—my confirmation has been mentioned on several occasions here today. And one of the things, the commitments that I was asked to make in my confirmation hearing was would I enforce the laws of the land. I committed to do that. I think it's an honor and a privilege to do that. I would expect to do that in regard to those laws and other laws, because I don't believe it's the job of the Attorney General to pick and choose.

Mr. SMITH. Well, since the last administration had virtually no record, would you expect to have a better record?

Attorney General ASHCROFT. I would hope.

Mr. SMITH. My next question goes to what we might refer to as a Federal Project Exile. Would you support a law that Congress would draft that would mandate jail time for anyone convicted of a crime who used a weapon or possessed a weapon during the commission of that crime?

Attorney General ASHCROFT. Well, as you well know, the Project Exile was based on the enforcement of a Federal law that had those kinds of provisions in it. Whether it would be exactly the same as another proposed law to carry toward those objectives, obviously it would remain to the details. But it's my belief that when the Federal Government cooperates with State and local authorities to focus on gun crime that we can reduce violent gun crime substantially in our culture.

The President has announced a Safe Neighborhoods program which is designed to encourage U.S. attorneys in the Justice Department to work with local authorities to first partner with them and then to plan strategically to isolate areas where there's lots of gun crime and to find ways between the enforcement agencies—State, Federal and local—to prosecute gun crime and to make sure that there is real time done and, thirdly, to communicate through the community that this is the policy so that it becomes understood by the various elements, including the criminal element, that if you do the crime, you're going to do time.

I think that's effective, and I support that concept. The President's allocating substantial resources to it in terms of the next budget, and we need to reduce violent gun crime in the culture. The freedom to be free from injury in one's person as a result of the use of guns by criminals is a major freedom that is to be protected by the Justice Department.

Mr. SMITH. Mr. Ashcroft, I have two more questions. One is that you mentioned a while ago there was no racial bias in the Federal death penalty cases. I am just curious, what is the explanation for the higher percentage of whites who are convicted versus minorities?

Attorney General ASHCROFT. Well, the entirety of the report will be available. The statistical analysis is substantial. These were carefully done studies undertaken both by this administration in terms of the last 250 cases, the previous 700 cases were the subject of an analysis and report undertaken by the last administration.

Mr. SMITH. The point again is that there is no bias one way or the other, to the best of your knowledge.

Attorney General ASHCROFT. In terms of charging death-eligible crimes, it appears that more frequently whites are charged than blacks in asking for the death penalty. In those death-eligible crimes, it appears that whites are charged more than blacks or Hispanics; and it also appears that this is true whether the crime is white on black or black on black or black on white. So that there is a substantial basis for confidence that at the Federal level—and Congressman Conyers pointed out that this study does not purport to address the State level where most of the prosecutions for death-eligible crimes take place, but at the Federal level there is an absence of any evidence of bias or racial discrimination.

Mr. SMITH. Thank you for your answers.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from Wisconsin, Ms. Baldwin.

Ms. BALDWIN. Thank you, Mr. Chairman.

To keep within the Chairman's strict enforcement within the 5-minute rule, I would ask unanimous consent to be able to submit follow-up questions for answer.

Chairman SENSENBRENNER. Without objection, pursuant to the deadline announced at the beginning of the questioning.

Ms. BALDWIN. General, my question is in regard to mergers and consolidation in agriculture, something that is of great concern to me and the constituents I represent.

Last session former Indiana Congressman Ed Pease and I asked former Judiciary Committee Chairman Hyde for a hearing on this issue, and it was a very informative hearing and something that I hope we will continue to look at in this Committee. But, as you know, more and more segments of agriculture are facing increased market concentration.

For example, according to the University of Missouri, which annually reports on these matters, four corporations control approximately 80 percent of the beef packing market. Farmers in all commodities are increasingly finding that they can sell their product to only a few companies, which drastically reduces a farmer's market power.

As you know, a farmer's produce is unique. Food is a human necessity, and most farmers can't withhold products from the market in an attempt to increase demand and price for their commodity. Their products have a limited shelf life without processing.

In many sectors, farmers are dependent on processors to add value to their product. In these instances farmers cannot sell directly to their retailers. They can't cut out the middlemen because their commodity must be processed to have worth to the ultimate consumer. Because the farmer is dependent on the processor and because agribusiness has become so consolidated, farmers are now at the mercy of agribusiness to give them a fair price, and they have nowhere else to go.

General, I know that you are concerned about this issue also. The U.S. introduced the Fair Play for Family Farms in the Senate last year, and one of the provisions of your bill would have added a new position of Assistant Attorney General for Agricultural Competition within the Department of Justice who would have been responsible for agriculture-related antitrust matters.

My questions are, do you still feel that the Department of Justice needs such a position created to be able to adequately enforce agriculture antitrust matters? If not, why not? And, on a related note, I would be interested in your opinions on what additional authority the Department of Justice needs to assist in their oversight of the—assist the Department of Agriculture in their oversight of the Packers and Stockyards Act.

Attorney General ASHCROFT. I thank you very much for the question. It reflects a series of concerns that I was accustomed to articulating when I served in my prior incarnation on the other side of the Capitol, and in many respects it emphasizes the need for a perspective on the part of the Department of Justice that looks upstream to producers as well downstream to consumers when we come to the point of agricultural mergers.

I think there is a responsibility to do so and I have spoken to those who are responsible and in charge of the Antitrust Division in the Department of Justice to indicate and to confirm with them that I want upstream analysis as well as downstream projections so that producers are adequately regarded in any proposed mergers or acquisitions that could consolidate further the industry.

We have, pending Senate confirmation, a new Antitrust Division Chief and I can commit to you that I will make clear to the Antitrust Division Chief who is to take charge that I expect that to be a part of his considerations. Those who are running the Antitrust Division now have committed to me that that is a part of their consideration. So that each person in the Division that evaluates mergers and acquisitions is evaluating with that in mind.

I should add that there is a person that I maintain, as designated in the Department, to look at those aspects of agriculturally related mergers and acquisitions, and his name is Mr. Doug Ross. His specific responsibility is the—is to develop this awareness and maintain and help the Division understand the need for upstream as well as downstream analysis when it comes to mergers and acquisitions in agribusiness.

My time is up, but let me just say one other thing. I'm eager to participate with the Department of Agriculture in terms of making sure that the Packers and Stockyards Act is adequately enforced. Some of the governmental reporting in recent times has indicated that there hasn't been the kind of complete and vigorous enforcement of that Act which might otherwise relieve some of the distress for America's farmers.

Chairman SENSENBRENNER. The time of the gentlewoman has expired.

The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman; and thank you, Mr. Attorney General, for appearing before us this afternoon.

As you mentioned in your opening statement and as we've had an opportunity to discuss recently, there has been some very unfortunate racial unrest in my district in my hometown of Cincinnati, and the entire community has been deeply troubled by these events. As you know, some national media reports have suggested that the problems stem from the Cincinnati police being involved in the deaths of 15 African American suspects since 1995. However, they generally fail to mention that the vast majority of these incidents involved suspects wielding weapons and threatening police.

According to a story written by Derek Deplege in the May 20th edition of the Cincinnati Inquirer, six of the suspects were armed with guns, another took an officer's gun away and shot another officer, one was armed with a knife, one wielded a brick and charged the police with the brick, another threatened a police officer—in fact, took a swing at the police officer's head with a board containing protruding nails, and two other incidents involved suspects in cars, one of which tragically dragged a Cincinnati police officer to his death less than a year ago. It was back in September of last year. And I raise this issue because I'm hopeful that the Justice Department will proceed in a fair and open-minded manner, carefully reviewing the facts in each of the cases while conducting the investigation in a cooperative manner.

I recognize that you made a commitment to this cooperative approach back on May 7th of this year, just about a month ago, when you issued a statement announcing that the Justice Department had opened a pattern of practice investigation of the Cincinnati Police Department and that the Justice Department will provide Cincinnati with expert technical assistance on how to best reform their policing practices. You said the Justice Department's focus will be on assisting the City to solve its problems and rebuild trust among citizens of Cincinnati and that the Justice Department will work cooperatively with the City to institute policing reforms as quickly as possible.

An official in the Justice Department Civil Rights Division was quoted in the Cincinnati Inquirer saying, "We are trying to create a new emphasis on cooperation." And went on to say that "I think cooperation is a much better way to proceed rather than an adversarial way."

From what I know and from what I've read about the pattern of practice investigations conducted by the Justice Department's Civil Rights Division under the previous administration, such as the investigations into Pittsburgh and Steubenville and Columbus, Ohio, those police departments, those investigations were conducted in a more adversarial manner. So your stated approach is something new.

Now, I have several questions. How does the Civil Rights Division intend to implement these changes? And will the Division notify the City and the Cincinnati Police Department of its findings as the case proceeds during the investigative process? Will the City be given a chance to voluntarily make changes to its policies without being bound by a consent decree?

And additionally in your opening statement you had said that protecting the civil rights of all Americans is a priority and referred to your Department's actions in Cincinnati.

First, I want to state that I strongly agree with you, as I know all the people in Cincinnati do, that protecting civil rights should be a top priority; and no citizen should be judged on the basis of their race. I'd like you to clarify, however, one point. You did not mean to imply, did you, that you or the Justice Department have reached any conclusion in this matter or that you've determined that anybody's civil rights have been violated or that you believe it's the policy of the City of Cincinnati to judge people based upon their race?

I'd appreciate your response; and, again, I really do appreciate you being here this afternoon, Mr. Attorney General.

Attorney General ASHCROFT. I thank you.

When we investigate, we have a responsibility to investigate fairly without preconceived notions. And our intention is to try and do everything we can to provide what's necessary for good communities to operate, and that's a basis of trust between the law enforcement community and the citizens. And we can't do that if we go in with preconceived notions or prejudice about guilt or innocence or other kinds of prejudgments. So I want to assure you that I'll do everything I can to make sure that we conduct the business of the Department of Justice in a way which is based on facts and

circumstances and the truth, and I thank you for your commitment to that.

Let me just indicate quickly that fixing the blame is one thing you can do. I think that's a responsibility from time to time for the Justice Department. But fixing the problem is what we really all ought to be about, and I think we can do that if we cooperate. And one of the things I want to instruct for the Division is that when we come to a problem, instead of stacking it up to be revealed later at the end of 2 years in a report, we say let's talk about this problem and see how it can be remediated immediately, and let's work as quickly and thoroughly as we can to solve problems.

I would hope that Cincinnati becomes a model. This is a dream, an aspiration for restoring trust between the citizens of the community and those who are responsible for the community. It would be a wonderful way for us to begin our effort together.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you.

Mr. Attorney General, the President has said during the campaign that, while he was opposed to a blanket amnesty, he had a very positive view of legal immigration and understood many of the specific situations that occur and essentially staked out a position different than some in his party had taken over the past 5 years on key legislative efforts. Since he has become President, since you've become Attorney General, relatively little attention has been paid to four or five actions that you have taken which I think deserve our appreciation and heartfelt thanks and I think are consistent with the tone the President set on some of these issues.

He extended temporary protective status for Salvadorans. He provided it as a result of the earthquakes in January and February. He extended for Hondurans and Nicaraguans temporary protected status as a result of their failure to yet recover from Hurricaine Mitch back in 1998. He has indicated his support for an up-to-1-year extension in 245(i), the provision that would allow people who have either overstayed their visas or entered illegally but who were being petitioned for by family members or employers to adjust their status within this country, a very sensible and appropriate position and, as you indicated in your testimony in response to Chairman Sensenbrenner's question, supporting a reorganization of INS which separates enforcement for services but by reporting to one key staff person, both sides, ensures that services—helps to ensure that services don't get short shrift in all of this.

There are some other issues coming up that I think are consistent with being opposed to a blanket amnesty but make some sense. I want to throw those out for your consideration.

We have kids in this country, many of them who came here at the age of 3 or 5 or 8 or 10 or 12 not because of their own decision but because of their parents' decision. As a result of provisions in the 1996 law and other provisions, these people have gone to school and, in many cases, they have performed excellently. They're valedictorians of classes. They're straight A students. They could qualify for any of our major public or private universities. But they are ineligible even if a State wants to provide them with in-State tuition to pay that tuition. They are forced to pay many times more

than that, frequently losing their chance of public education or ineligible to compete on merit, not based on some quota but just for merit for any of the Federal scholarship programs they applied for. Mr. Cannon and I and Ms. Roybal-Allard have a bill to deal with this issue. I ask you to take a look at that.

We have a really absurd cap that limits the number of assylees that can adjust to legal status. These are people who have been found to have a well-founded fear of persecution, are in this country lawfully, not asserting a specious claim or even asserting a claim. They have already been determined—adjudicated to be legal assylees in this country, but they cannot adjust their status to permanent resident status because we have a quota of 10,000 a year. That makes no sense. They're in this country. They are here lawfully. They are determined to be here lawfully. This cap makes no sense, and I think it should be eliminated.

Third, in many sectors of the economy, we have to realize—you take agriculture. Probably anywhere from 50 to 80 percent of the people who toil in some of the most difficult jobs in America today, harvesting, planting, cultivating our perishable fruit and vegetables, are undocumented. We have created some concepts and gotten bipartisan support for concepts involving earned adjustment where people who have done certain kinds of work and who pledge to continue it have the possibility at the end of the day based on that work performance to adjust their status.

You're involved with the binational commission that is looking at some of these migration issues. I hope that that commission doesn't ignore the status of some of these workers in this country who are paying taxes and doing essential work. I think there is a chance in many of these areas to continue what you have already started, working on a bipartisan basis that I think really is in the country's interest and has great humanitarian, compelling appeal; and I'd be interested in either long-term reactions or if you have any off the top of your head to some of these issues.

Chairman SENSENBRENNER. On that happy note, the time of the gentleman has expired.

The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. Attorney General, for the record your prayer life does not bother me. I think whether the people embrace or reject prayer services may be subject to interpretation. If there was some sort of intimidation or coercion surrounding that, it would be a different story, but I can't believe that that's the case.

It was said earlier that the Justice Department is leaking like Niagara Falls. I guess that the good news is that the Justice Department is leaking, not gushing like Niagara Falls. If there is in fact a leak down there, Mr. Attorney General, I'm confident that you will terminate it before it reaches the gushing threshold.

The Chairman commented about the FBI's possibly having had its armor tarnished. I still think it's a first-rate outfit, first-rate organization. I am bothered, Mr. Attorney General, that it has become very bureaucratic. If you can make that organization a little less bureaucratic on your watch, I would be appreciative. I think others would.

Now permit me to direct attention to our Subcommittee on Courts, the Internet and Intellectual Property. Can you update the Committee on the extent to which prosecution of intellectual property crimes is becoming a greater priority for the Department of Justice?

Attorney General ASHCROFT. Well, Congressman, I thank you for both your comments and your question.

We have recently welcomed to the Criminal Division a newly confirmed—just last week—director of that Division. Crime has developed new dimensions as a result of the Internet and as a result of the data processing and data transmission, and I can say to you that we take very seriously piracy and theft and the invasion of privacy and a whole variety of issues that are related to the advent of the capacity of individuals to utilize the computer both in industry and personally.

Given the fact that much of America's strength in the world economy is a result of our being the developer and promoter of most of the valuable software, we cannot allow the assets that are held electronically to be pirated or infringed. So we will make a priority the cybercrime issues, and additional resources have been requested in next year's budget for that. And that's not just in this administration submission to the FBI but in regard to the Commerce Department as well, because they are also concerned about the protection of this area of commerce in which the United States holds a preeminent position.

Mr. COBLE. Well, I'm glad to hear you say that, Mr. Attorney General. Because the intellectual property community, as you just pointed out, is a significant contributor to the commercial wheel turning in this country. And, as you also implied, the provisions of the net act gives you all additional pegs upon which to hang your hat in pursuing cyberpirates. I hope that you all are utilizing that justice, and I feel confident that you are.

Good to have you with us, Mr. Attorney General.

In the interest of time, Mr. Chairman, I yield back.

Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Meehan.

Mr. MEEHAN. Thank you, General. Welcome to the Committee.

The Chairman had referenced in his opening remarks that we're reading about developments of the Timothy McVeigh case. I think that that case is giving many in America pause to think about the FBI's reliability.

But for those of us who are in Massachusetts, picking up morning papers and reading bombshells about the FBI's practices is unfortunately nothing new. We've been treated to an ongoing, multiyear expose of relationships between certain Boston FBI agents and drug-pedaling, murderous gangsters. The gangsters gave the agents some information about rival criminal enterprises and, in return, the agents protected gangsters every step of the way, blocking other law enforcement investigators and investigations into their ongoing crime spree and even letting the gangsters know who was ratting them out to law enforcement officials. The gangsters then would take matters from there.

The FBI's credibility wasn't merely damaged in this instance; it was broken. And the only way to restore that credibility is for the

truth to get out and for those who committed and tolerated crimes to be held accountable. It seems to me without accountability there can be no credibility.

Now, the Government Reform Committee has already held one hearing on a narrow piece of this controversy; and Chairman Burton is now moving to expand that inquiry. Yesterday, he sent a letter to you requesting a variety of records in unredacted form, including information about the top echelon program, personnel records for former FBI agent John Connelly, the FBI Office of Professional Responsibility reports on agents' relationships with Whitey Bulger and Steven Flemming; and the request was for all this information to be provided by June 19th.

How do you intend to respond to this document request? In other words, do you anticipate full compliance, partial compliance, or no compliance? And has the letter been forwarded to the special Justice Task Force created to investigate the handling of the Whitey Bulger, Steven Flemming case? And, if so, have you provided any instructions or guidance to the task force in terms of a response?

Attorney General ASHCROFT. Well, first of all, this is a very serious matter; and whenever law enforcement officials are involved in ways that discredit law enforcement and undermine the enforcement of the law, it's to be taken seriously. We have a Justice Task Force that's comprised of Federal prosecutors and FBI investigators from outside of Massachusetts which is focusing on possible law enforcement corruption relating to the handling of informants in the Boston area. The task force has been conducting this investigation for almost 2½ years now; and one of the informants recently pleaded guilty to multiple felony counts, including obstruction of justice, extortion and money laundering. The ongoing task force investigation has resulted in indictments of additional individuals, including a former FBI agent. That's what you've made reference to.

Our provision of exculpatory records contributed to the State court relief afforded to some other individuals whose names I'm not mentioning but I think you probably know them. And while the Department responded to oversight requests for information regarding one individual in the 1965 murder of Edward Deegan, we have requested that other oversight inquiries regarding these matters be deferred in order to avoid inadvertent interference with the task force investigation.

Let me just say this, that I'm eager to comply with requests; and to the extent that we do not interfere with the responsibility to correct these problems and to prosecute the violations, we'll work to find a way to comply with those requests for information.

Mr. MEEHAN. So will it be partial compliance? You're not clear yet whether or not you'll be able to—the June 19th deadline in particular. I understand the ramifications of an ongoing criminal investigation.

Attorney General ASHCROFT. I guess what I have to say to you, while I'm not an expert in this particular case, I will instruct the Department to cooperate to the extent that they don't interfere with our law enforcement responsibility. And if that can be pretty thorough, fine. If it has to be redacted, fine. Maybe not so fine, but it has to be that way. And there may be areas where we simply have to say we have to defer.

Mr. MEEHAN. I think generally—generally because the American people—if this is an isolated incident, I think we're going to have to look to expand to see whether or not there is a culture we need to look at. Obviously, we look at the guidelines. Congressmen Delahunt, Frank and I have requested this Committee look at a hearing on guidelines as well.

Chairman SENSENBRENNER. The gentleman's time has expired. Mr. Gekas.

Mr. GEKAS. I thank the Chair.

General, the newspapers, particularly the Washington Post of recent date and also some TV coverage, has focused on the other death row case, not the McVeigh case but the one there which the drug kingpin has been convicted and properly sentenced and a date of execution set for him. These newspaper articles, quoting the various moratorium groups, et cetera, and defense attorneys for him, I suppose, all were maintaining that the studies that were promised have not been fulfilled and there's great question about disparity of treatment and so forth.

I believe you've answered all of those questions in the testimony that you've given today, and I've reviewed your written testimony, and there should be no doubt that the studies, both the one initiated by the Clinton administration and yours, confirm that the process for Federal death penalty has been fairly—has been well proportioned.

The question I have now, in view of the fact that the studies have confirmed the position that we all wanted to see happen in the application of the death penalty on the Federal level, has there been any movement to set that execution back even further than the first postponement?

Attorney General ASHCROFT. No.

Mr. GEKAS. So that is scheduled for when?

Attorney General ASHCROFT. It's June the 19th.

Mr. GEKAS. The newspaper accounts also indicated that the individual involved wrote a letter to the President asking for commutation. Have you been consulting with the President, giving him your recommendations and the data that might be needed for his consideration?

Attorney General ASHCROFT. I'm happy to consult with you here. I will make my consultations with the President and not in the Committee, if possible.

Mr. GEKAS. I'm just saying, have you consulted. I'm not asking what the nature of it was.

Attorney General ASHCROFT. You know, Garza claims that he's the victim of ethnic and geographic disparity and—even though he's clearly guilty of these crimes. And it must be noted that the Southern District of Texas, where he was prosecuted, only submitted cases involving five defendants to the Department's capital case review procedure before 1995; and all of these defendants were Hispanic. But the District recommended against seeking the death penalty for any of those.

The Attorney General accepted the U.S. attorney's representation not to seek the death penalty in those cases but Garza. So he's not a part of a situation where there's an automatic effort for Hispanics. He's an individual who I think seven of his eight victims

were Hispanic. And if I'm not mistaken, the—he was tried in a context by his peers. So there is no reason that I know of to defer his execution.

Mr. GEKAS. Thank you. That confirms the Congress's initiative several years ago to make a special case out of the drug kingpins who would murder and direct the killing of others in the furtherance of their criminal enterprises. I thank you for your response to that.

One other question and that has to do with what policy may have been established thus far in your administration on the use of so-called secret evidence or classified information in the proceedings before immigration authorities. Is there a sense of what you might be recommending there? Because our Committee is going to have to grapple with that sooner or later again.

Attorney General ASHCROFT. Frankly, the President of the United States has expressed his discomfort with this aspect of American immigration, and we have not to date during this administration used such evidence. I think it is an issue worth our working together on and would welcome discussion about how we manage the responsibilities of effectively enforcing our laws and also protecting the rights and respecting individuals in their own rights.

Mr. GEKAS. I thank the General, and I return the balance of my non-time.

Chairman SENSENBRENNER. And that's what it is.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you.

General Ashcroft, we've been talking about the racial profiling. The reason the people have the belief that they shouldn't be profiled is found in the Constitution, the unreasonable search and seizure provision. Usually, that provision is enforced by the exclusionary rule. If you've had an unreasonable search or seizure, whatever evidence that is gained as a result of that can't be used at trial and that eliminates the incentive that police have to collect illegal evidence. Although a guilty person might occasionally go free, innocent people aren't subjected to the indignity of these illegal searches.

I guess my question is, if we're serious about prohibiting racial profiling, it seems to me that the traditional way of enforcing that provision of the Constitution ought to be used. That is, to prohibit the use at trial of any evidence obtained after a profile stop. What are your feelings about using the exclusionary rule to put an end to racial profiling?

Attorney General ASHCROFT. Well, obviously, I believe racial profiling is wrong; and I think we ought to do what we can to eradicate it. We're in the process of doing that in the Federal Government and assessing where we are. I was pleased to have Congressman Issa's approach on that. I would be willing to discuss the idea. Frankly, that's the first suggestion that I've——

Rather than announce a conclusion on it, I'll confer with the Justice Department individuals in that respect. I think that's as far as I want to go right now on that.

Mr. SCOTT. We've talked about the McVeigh case for a little while. It seems to me that there were mountains of material that

did not get turned over as the court had ordered it to be turned over. Are you satisfied that Mr. McVeigh got a fair trial?

Attorney General ASHCROFT. I am satisfied; and let me clarify to some degree, if I can.

The eligible universe of documents was almost infinite. There were hundreds of thousands of documents that could be arguably required to be turned over. And when I learned that there were 3,000 so-called documents, I said, we cannot expect people in 4 days to digest these and make appeals or what have you.

So we put out a universal order to sweep the offices to collect any documents and to provide those to the defense. They were provided to the defense, and we looked at them first. The defense came up with documents that they said could possibly have any relevance. They could only name nine of them. You know, we had things like people writing letters in saying that if you'll give me a billion bucks and if you'll release my boyfriend from prison and arrange for me to meet with some royalty in Europe I'll tell you who's responsible for the bombing. Or people who sent in folders of newspaper clippings. Those were among the documents.

So the defense found only nine documents, and it alleged those in a submission to the court, the Federal court. And we looked at those nine submissions and every fact in those nine documents was a fact that was disclosed in other documents that had previously been provided.

Mr. SCOTT. Were they entitled to these documents?

Attorney General ASHCROFT. They were entitled to the documents pursuant to the agreement at trial that all documents——

Mr. SCOTT. And they were not turned over.

Attorney General ASHCROFT. These documents were not there at the time of the trial. And——

Mr. SCOTT. Well, then—well, I think you've answered the question.

Let me ask you one quick question if I can. If a person is fully qualified to be a drug counselor, should he be entitled as a matter of law to apply for that federally funded job without being discriminated against because of his religion?

Attorney General ASHCROFT. Depends on who the employer is. The Congress exempted in the most recent reauthorization of SAMHSA certain religious groups in the faith-based community who participate under the provisions of the SAMHSA law religious groups from their involvement in title VII. And so I think—I'm giving you my best legal judgment here, and I think that's probably what you were driving toward.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Arizona, Mr. Flake.

Mr. FLAKE. Thank you, Mr. Chairman.

Thank you, General Ashcroft. I want to commend you for getting to Arizona so early in your tenure. There are a lot of issues, as you know, there. I was just outside speaking to one of the ranchers, Dan Bell from southern Arizona, who ranches on the border who mentioned that they have as many as 300 illegal immigrants come on their ranch every week. So, as you know, it's a large problem there.

Another issue that points up a lack of communication sometimes between the INS and local law enforcement agencies is the fact that sometimes potential criminal aliens are deported before charges can be brought or fully explored and the process go on. I know that some of those issues have been resolved. Can you comment on efforts by the Department of Justice to actually remedy that situation?

Attorney General ASHCROFT. This administration is very sensitive to the safety of the communities and to the safety of the border area; and, frankly, we are interested in the safety of all individuals at the border. We were distressed immeasurably at the deaths of over a dozen individuals near Yuma a very short time ago, but we are also very concerned about law enforcement. We feel that when the Congress enacts and expresses the will of the people and it's signed by the President and law, it is to be respected and it is to be enforced.

The responsibilities for safety and security in law enforcement are not just Federal in the border area, they are—it is a combination joint responsibility between the communities, the States and the Federal Government. And the President of the United States included, for example, to reflect his keen understanding of the additional burden of those counties that are border counties, he proposed in his budget this year an additional $50 million to assist local prosecutors at the border so that the team effort that we have that respects the rights and the integrity and security of individuals can include an aggressive law enforcement effort by both State, local and Federal officials.

So, with that in mind, I think this administration is committed to safety, not just the border safety initiative itself, which is designed to make sure that we treat people with respect and, as our first priority, secure their safety, but also that we have the right law enforcement impact in border communities.

Mr. FLAKE. You mentioned the deaths last week. It was 17 or 18 now, I believe, illegal immigrants perished in the desert trying to cross in 110 degrees. We're hearing reports now that the Mexican government actually has a program, a $2 million program, to distribute survival kits. Can you comment on that? Do you know anything about that? Is that overblown? It is that they issue survival kits to people attempting to cross the border. Has that come on your radar screen?

Attorney General ASHCROFT. It has. Many of us are torn and a good number of American citizens are torn to see the human misery that comes with people who enter the desert unprepared. But I personally think it's not the right thing to do to have survival kits distributed to people in anticipation of their effort to cross the border illegally.

I have expressed that opinion to the individuals in the government of Mexico, and it's my understanding that they have not embraced the program. This issue is one that is current. I noticed CNN last night had a substantial bit of programming on it, and it's a matter of deep concern. But we don't think solving this problem is—we don't think the problem is susceptible to solution by equipping people who would illegally come across the border.

Mr. FLAKE. I commend you for having the U.S.-Mexico Migration Working Group, and I hope that issues like this are dealt with in that context and that we move toward solutions like Congressman Berman and Senator Graham and others are talking about with the guest worker program.

Attorney General ASHCROFT. Frankly, I think we've been able to make some progress, and we would look forward to your suggestions and advice in making the border a community which is safe and secure.

Mr. FLAKE. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from California, Mr. Schiff.

Mr. SCHIFF. Mr. Attorney General, as a former Assistant U.S. attorney I have a great regard for the Department and want to join and welcome you here today.

I want to ask you, I think there is a great probability that during the course of your tenure there may very well be a change in membership of the U.S. Supreme Court. You committed here today and in your confirmation proceedings to enforce the laws of the land, and I want to ask you about a couple in particular in the event the membership of the Court changes.

If there is an effort, legislatively or otherwise, that is direct, unequivocal and on its face designed to overturn *Roe* v. *Wade* with a new Court, can we count on you and the Justice Department to unequivocally oppose that effort and defend *Roe* v. *Wade*?

Attorney General ASHCROFT. I don't understand the question. You say if there is legislation?

Mr. SCHIFF. In other words, if we have a new membership of the Court and some view it as an opportunity to get the new Supreme Court to revisit *Roe* v. *Wade*, perhaps to overturn it, can we count on the Justice Department to defend *Roe* v. *Wade* and encourage and urge the new Court to follow the *Roe* v. *Wade* precedent?

Attorney General ASHCROFT. Well, I consider *Roe* v. *Wade* to be settled law. And I will not try to forecast individual cases and how I would argue and what legal strategy would exist in individual cases. That's not something that is important for me to do. But *Roe* v. *Wade* is the law of the land, and I respect it and will enforce the law as it is.

Mr. SCHIFF. I'm not asking you to comment on a case that may arguably be in opposition to *Roe* v. *Wade*, but where there was a direct and unequivocal effort to overturn the case we can count on you to defend it, even with a new Court.

Attorney General ASHCROFT. I would say to the Court that I consider *Roe* v. *Wade* to be settled law.

Mr. SCHIFF. Similarly, on the issue of guns, Mr. Attorney General, if there is an effort either with this Court or a subsequent Court to either strike down portions of the Brady law or in the event that the McCain legislation to close the gun show loopholes passes, can we count on the Justice Department to argue that the Brady law and the closing of the gun show loopholes are consistent with the second amendment?

Attorney General ASHCROFT. The answer to that is yes. I will defend the enactments of the United States Congress as signed by

the President, and this President is in favor of closing the gun show loophole, so this administration is on record of doing that.

Mr. SCHIFF. One of the bills that I hope will pass this session is a campaign finance reform measure. I wanted to get your thoughts on that. Should McCain-Feingold pass in the same form that it has currently passed out of the U.S. Senate, can we expect the Justice Department to vigorously fight to make sure that it withstands any attack under the first amendment or any other challenge?

Attorney General ASHCROFT. I consider it my responsibility to defend the enactments of the United States Congress and would expect to do so unless there were a blatant part of a measure which was clearly unconstitutional which would place me in countervention with my oath to defend the Constitution.

Mr. SCHIFF. In your personal view, would a ban on soft money be consistent with the first amendment?

Attorney General ASHCROFT. I'm not prepared to make a complete response to that now, but I would expect it to be. I don't think that it's not.

Mr. SCHIFF. Finally, Mr. Attorney General, I wanted to encourage you, in follow-up on, I think, Mr. Gekas' question with respect to the secret evidence rule. I had the unfortunate distinction when I was in the U.S. attorneys Office of prosecuting the first FBI agent accused of espionage, Richard Miller. In that case we successfully used the Classified Information Procedures Act, which I thought was a good balance between the imperatives of a prosecution, the need to protect classified data, and also the ability to give the defense opportunity to defend itself. And I would encourage you, Mr. Attorney General, to consider using a CIPA-like process to repeal the secret evidence rule but put in place a mechanism that I think will protect the public safety and, at the same time, observe the constitutional rights of anyone detained.

Attorney General ASHCROFT. Well, I want to thank you for your sensitivity to those issues.

We recognize those issues as being very difficult issues that the tender intersection between the need for national security and the rights that individuals have, and we would welcome the opportunity to help decide and to participate in your deliberations. I believe, ultimately, the Congress will make the decision, but we would like to work with you in that respect, if possible.

Mr. SCHIFF. Thank you very much for your appearance, Mr. Attorney General.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Georgia, Mr. Barr.

Mr. BARR. I would like to echo the thoughts of many of our colleagues and thank you for your appearance here and take this opportunity on the record, Mr. Attorney General, to congratulate you for taking on this service as our Nation's Attorney General.

Attorney General ASHCROFT. Thank you.

Mr. BARR. I would like to also echo the sentiments expressed by former Chairman Hyde on commending you on the fine selection of many of your staff—actually, all of your staff. But many of your staff came from the Judiciary Committee, and you have acted most wise, even though it has decimated our ranks over here. But we do appreciate that and appreciate working with them.

You're a very patient man, a true gentlemen to sit there earlier in the face of what I consider one of the vilest attacks I've ever witnessed on a witness simply coming before this Committee and answering questions. In the space of about 15 minutes you were blasted for handling a case involving a sitting United States Senator from which you've recused yourself.

You were blasted for replying to a letter from a bona fide organization requesting the Department's views on one portion of the Bill of Rights. And your letter back to them simply said that that portion of the Bill of Rights, it happened to be the second amendment, as with other parts of the Bill of Rights by definition and practice and history indeed do confer rights and reflect rights of individuals.

You were blasted for praying.

And then, when you in your later comments indicated to this Committee that you had undertaken in the face of some evidence and some criticism regarding the application of the death penalty by the Federal Government that you had undertaken some, I think, very important initiatives to look into this and change some of the procedures, you were blasted for that.

Obviously, you would have been blasted for anything you would have said there; and you're very much of a gentlemens' gentleman for just sort of sitting there and taking that sort of treatment. I commend you for that.

Mr. BARR. With regard to the death penalty and in light of the two pending Federal death penalty cases that have been in the news much lately, that of Mr. Garza and Mr. McVeigh, in light of the fact that the court today with jurisdiction over Mr. McVeigh's case ordered that no further delays as far as that judge was concerned would be granted, which I believe also reflects the position of the Department of Justice; is that correct?

Attorney General ASHCROFT. That's correct, we do not believe that any further delay in justice is warranted. We think that a delay in justice would be a denial of justice.

Mr. BARR. And in light of the impending execution of Mr. Garza, after which you've indicated today the position of the Department of Justice is that that execution also should move forward as scheduled, do you see any reason at this time to consider what has been termed a moratorium on death penalty cases?

Attorney General ASHCROFT. Frankly having conducted the very thorough study; that is, a sequential study to the very thorough study conducted by my predecessor Ms. Reno, she studied 700 cases and we studied an additional 250 cases, neither she nor I as Attorney General on the basis of those studies could find a reason for a moratorium. There is no indication that in the Federal death penalty system there is any prejudice on the basis of race or bias on the basis of race. The only information is that slightly more frequently among whites is the death penalty sought than it is among either blacks or Hispanics, and on another note of principle, I would say that this Congress and previous Congresses have established a clear policy for the United States, that there are certain acts so heinous in their character that they deserve the death penalty, and for me to somehow seek to displace this valued judgment in the law established by the Congress, signed by the President, the expression of the will of the American people would be, I think,

inappropriate. I think there is no reason for us to have a moratorium in the Federal system on the death penalty and the judgments that we've reached on the studies affirm that. We are going to study additionally whether or not murder is appropriately understood in the culture and is punished, and as it should be because there is some suggestion that there is an inadequate regard and that life has become less protected than it ought to be.

Mr. BARR. Thank you. I'd like to ask unanimous consent, Mr. Chairman, to include in the record a letter dated May 17, 2001 from the Attorney General, referred to earlier, setting forth his views on the application of the second amendment to citizens of the United States.

Chairman SENSENBRENNER. Without objection, so ordered.

Gentlewoman from California, Ms. Lofgren.

[The information referred to follows:]

05/22/2001 Typos corrected. This now should be an accurate representation of the original.
http://wmsa.net/ashcroft.htm from the web pages of the Western Missouri Shooters Alliance

Office of the Attorney General

Washington D.C. 20530

May 17, 2001

Mr. James J. Baker
Executive Director
National Rifle Association
Institute for Legislative Action
11250 Waples Mill Road
Fairfax, VA 20030

Dear Mr. Baker,

Thank you for your letter of April 10, 2001 regarding my views on the Second Amendment. While I cannot comment on any pending litigation, let me state unequivocally my view that the text and the original intent of the Second Amendment clearly protect the of right of individuals to keep and bear firearms.

While some have argued that the Second Amendment guarantees only a "collective" right of the States to maintain militias, I believe the Amendment's plain meaning and original intent prove otherwise. Like the First and Fourth Amendments, the Second Amendment protects the rights of "the people," which the Supreme Court has noted is a term of art that should be interpreted consistently throughout the Bill of Rights *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (plurality opinion). Just as the First and Fourth Amendment secure individual rights of speech and security respectively, the Second Amendment protects an individual right to keep and bear arms. This view of the text comports with the all but unanimous understanding of the Founding Fathers. *See, e.g.* Federalist No. 46 (Madison); Federalist No. 29 (Hamilton); *see also*, Thomas Jefferson Proposed Virginia Constitution, 1764 ("No free man shall ever be debarred the use of arms."); George Mason at Virginia's U.S. Constitution ratification convention 1788 ("I ask sir, what is the militia? It is the whole people . . . To disarm the people is the best and most effectual way to enslave them.").

This is not a novel position. In early decisions, the United States Supreme Court routinely indicated that the right protected by the Second Amendment applied to individuals. See, e.g., *Logan v. United States*, 144 U.S. 263, 276 (1892); *Miller v. Texas*, 153 U.S 535, 538 (1893); *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897): Maxwell v. Dow, 176 U.S 581, 597 (1900). Justice Story embraced the same view in his influential *Commentaries* on the Constitution. See 3 J. Story, *Commentaries on the Constitution* § 1890 p. 746 (1833). It is the view that was adopted by United States Attorney General Homer Cummings before Congress in testifying about the constitutionality of the first federal gun control statute, the National Firearms Act of 1934. *See* The National Firearms Act of 1934: Hearings on H.R 9066 Before the House Comm. On Ways and Means, 73rd Cong. 6, 13, 19 (1934). As recently as 1986, the United States Congress and President Ronald Reagan

explicitly adopted this view in the Firearms Owners' Protection Act. *See* Pub. L. No. 99-308 § 1 (b) (1986). Significantly, the individual rights view embraced by the preponderance o legal scholarship on the subject, which, I note, includes articles by academics on both end of the political spectrum. *See, e.g.*, William Van Alstyne, *The Second Amendment and th Personal Right to Arms*, 43 Duke L.J. 1236 (1994); Akhil Reed Amar, *The Bill of Rights and th Fourteenth Amendment*, 101 Yale L.J. 1193 (1992); Sanford Levinson, *The Embarrassing Secon Amendment*, 99 Yale L.J. 637 (1989); Don Kates, *Handgun Prohibition and the Original Meanin of the Second Amendment*, 82 Mich. L. Rev. 204 (1983).

In light of this vast body of evidence, I believe it is clear that the Constitutio protects the private ownership of firearms for lawful purposes.[1] As I was reminded durin my confirmation hearing, some hold a different view and would, in effect, read the Secon Amendment out of the Constitution. I must respectfully disagree with this view, for when was sworn as Attorney General of the United States, I took an oath to uphold and defen the Constitution. That responsibility applies to all parts of the Constitution, including th Second Amendment.

Thank you for your interest in this matter.

Sincerely,

John Ashcroft
Attorney General

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[1]Of course, the individual rights view of the Second Amendment does not prohibit Congress from enacting laws restricting firearms ownership for compelling state interests, such as prohibiting firearms ownership by convicted felons, just as the First Amendment does not prohibit shouting "fire" in a crowded movie theater. As Samuel

Adams explained at the Massachusetts ratifying convention, the proposed Constitution should "never [be] construed . . . to prevent the people of the United States *who are peaceable citizens*, from keeping their own arms." Reprinted in 2 B. Schwartz, *The Bill of Rights: A Documentary History* 675 (1971) (emphasis added).

Ms. LOFGREN. Thank you, Mr. Chairman. General Ashcroft, I appreciate your being here today and I am sure there are many things that you and I don't see eye to eye on but I want to ask you a question about something that is nonideological, and that is the management of the Immigration and Naturalization Service. We all spend a lot of time on that. I just want to make a couple of brief references to letters I've just recently received about this.

One is from the program director for Catholic Charities in Santa Clara County about the Nicaraguan Adjustment in the Central American Relief Act. He says the asylum office in San Francisco is simply not scheduling NACAR interviews. They contacted the asylum office. They say it's third priority. It's really a consequence of——

Attorney General ASHCROFT. I am having trouble hearing you. Pardon me for interrupting you.

Ms. LOFGREN. I'll try and speak closer to the microphone. Essentially the San Francisco office is having simply no NACAR interviews. Many of these clients have been waiting for 10 years to legalize their status, and there's no—apparently no plans to make progress on the backlog, and I want to do just a few quick snippets out of 10 pages of a letter that I'd like to make a part of the record just to give you a flavor for what it's like.

Friday, March 9, 2001, my son-in-law and I set out early for the San Jose INS office. We arrived at 5:10 a.m. And were shocked by what we saw. The line to get in at 7 a.m. was already stretched the entire length of the building along the walls of the inner courtyard through the parking lot and out to the street. The first person in the line had been there since 6 p.m. Thursday night. By midnight there were many people camping out in line. By the time we were in line at 5 a.m., there were many families with children and quite a few pregnant women. This is an inexcusable remedy to ensure getting in the next day. It was absolutely barbaric.

We finally left the San Jose INS office at 1:45 p.m. What should have taken no longer than 5 minutes or should have been handled via the mail took 8 hours and 45 minutes of sheer hell. Having to deal with it in person in the San Jose INS office is emotionally draining, mentally abusive and physically exhausting, and this person also feels she's been financially victimized.

In my office, we're dealing with most cases that were filed in 1999, 2½ to 3 years to process routine matters, and my question is, I realize, this is not just of your making. This is a problem of long standing, but the question is, with regard to service, why have areas with significant backlogs; that is, backlogs in excess of 6 months, not received more staffing to address the backlogs and how long will it take the INS to process benefits with the same level of efficiency as the Social Security Administration?

Attorney General ASHCROFT. That's a very good question and I don't have a very good answer. I can't tell you how long it's going to take. I am appointing a person of excellent credentials and outstanding quality. I am not appointing, I am recommending to the President, who I believe is nominating that person and I shouldn't suggest it's my appointment. And I think we have a chance but we're going to have to work together. It stuns me to think about people starting to line up at 6 o'clock at night. The public safety

considerations for people who have to stay out all night are substantial and that's unacceptable and we will do—you know, the President and I have already detailed in this hearing the President's budget request for additional personnel, about $100 million a year for the next 5 years running to move us to a 6-month interval instead of a multiyear interval, but I can't tell you exactly when that will happen.

I wish I could assure you, but I cannot. I can assure you that we will impress upon the new director the urgency and will work aggressively with this Committee for reform in this respect.

Ms. LOFGREN. General Ashcroft, one final question. I mentioned 2 weeks ago when you were gracious enough to meet us for breakfast, the Unaccompanied Alien Child Protection Act, which I have introduced along with Congressman Cannon here in the House and Senator Feinstein and Senator Chafee in the Senate, would allow children who are unaccompanied who are seeking asylum to be treated as children are treated when they're abandoned or alone instead of incarcerated in juvenile halls or in some cases even with adult prisoners. You had not had a chance to look at that bill when we met 2 weeks ago. I am wondering if you have had a chance to review it and if you know whether or not you can support it.

Attorney General ASHCROFT. I am not prepared to indicate support except I am prepared to say this is a problem, and I think I addressed another question earlier. This is a problem that we must address, not just children but people who are detained who haven't committed crimes or detained for long periods of time are an embarrassment to our system of justice and freedom, and I would like to find ways to resolve this, particularly for innocent children.

Chairman SENSENBRENNER. The gentlewoman's time has expired. The gentleman from Indiana, Mr. Hostettler.

Mr. HOSTETTLER. Thank you, Mr. Chairman. Attorney General Ashcroft, let me welcome you today. Initially, as was mentioned earlier, many of us were intrigued by a story in the Washington Post that seemed to be critical of you for having a Bible study in the Department of Justice. I believe such activity is well within the first amendment and was actually encouraged by our Founding Fathers. I can just imagine how apoplectic the writers at the Washington Post would have been had they had to report on John Quincy Adams' activities as a Senator whenever he attended services both in the Capitol and the U.S. Treasury. In fact I hold a weekly Bible study in my office and would be happy to have you over any time.

I also want to quickly reiterate what Mr. Smith said regarding enforcement of obscenity cases. The previous administration was grossly negligent in this area, and I hope you will work to change this. My main concern today is over enforcement of the Freedom of Access to Clinics' Entrances Act, or FACE Act. As you are aware, this Act was passed by Congress and signed by former President Clinton in response to what its supporters claimed to be a national conspiracy of violence. I have serious concerns over the effect of the FACE Act and the enforcement steps taken by the previous administration.

First, it seems to me that FACE had some free speech concerns and that as a viewpoint is discriminatory. The motive element re-

quiring that the pro-life protesters are there because of the abortion nature of the clinic I believe singles out one viewpoint. In addition, I also think the act unnecessarily groups together violent actors and peaceful protestors seeking to express their opposition to the practice of abortion on demand.

I am aware, Mr. Attorney General, you have been repeatedly condemned for your life affirming views. I understand, however, as you do, that the FACE Act went through the proper constitutional procedures and was signed into law. I also understand that the statutory language gives the Attorney General some responsibilities. The FACE Act makes for a tough balance considering the passionate views about the life issue and the fundamental freedom of speech.

Although FACE certainly allows for justice involvement in prosecution, I think there would be prudential limitations the Department takes into consideration when State and local officials have the resources to enforce FACE and the Justice Department's resources might be better allocated elsewhere. For example, I have some concerns about turning low level misdemeanor offenses into cases for Federal prosecution. Similarly, I think it is a problem when simple leafleting is prosecuted as a Federal offense. This seems particularly poignant given the previous administration's lack of enforcement of, say, Federal obscenity laws.

In this regard, Mr. Attorney General, have you in your relatively new capacity had an opportunity to reevaluate the previous administration's approach to FACE enforcement and to develop a policy of your own?

Attorney General ASHCROFT. Thank you, Congressman. First of all, I take very seriously violence at abortion clinics and in any other settings, and I am currently very much interested in the extradition of one individual now held by French authorities who allegedly murdered an abortion doctor and I have been active in pursuing that. So I take it very seriously and I think the law has to be enforced.

If my recollection serves me well, we have had about maybe a dozen enforcement actions a year, so that the FACE Act does not consume a substantial enforcement responsibility of the overall load of enforcement in the Justice Department. This is not because we do not enforce the law with the kind of energy or vigor that would be required. It is just that there aren't that many circumstances. So I guess I would indicate that, as you have, that the FACE Act was passed with the kind of sensitivity to the process that it deserves. It deserves to be enforced and respected. It's a responsibility of the Attorney General to enforce it. I have pledged to enforce the law thoroughly and completely, but it is clear if you look at the data that the number of complaints is not overwhelming and does not consume a substantial portion of the Justice Department's resources.

Mr. HOSTETTLER. I yield back the balance of my time.

Chairman SENSENBRENNER. Gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Attorney General, I welcome you also, also welcome you to this Committee. Let me start by simply observing and following up on Ms. Lofgren's ques-

tions that in New York it takes 18 months to get an interview for citizenship with major problems for the applicants in the intervening period. They can't leave the country to visit an ailing parent, for example, without getting put back at the end of the line and other problems. At one time this took 2 weeks. I hope you will in terms of assignment of staffing and appropriations relieve this problem in the New York area, which is not unique in the country but it's 18 months in New York and that's frankly not good.

Second, let me ask—I have three questions. I hope your answers will be brief because there are three of them. First, I just today received notice of a decision by the Department of Justice yesterday that the Department has declined to prosecute a local police officer in New York who encircled one of my constituents, Mr. Gideon Bush, and shot him to death even though he was holding only a small hammer at the time and was clearly an emotionally disturbed person. As you may know, the Borough Park community in Brooklyn which I represent is extremely agitated over this sudden and somewhat surprising decision.

The last time I had a meeting on this subject at the Department, the meeting was with former Deputy Attorney General Eric Holder, who assured me there would be a careful investigation of this matter. I'm a little troubled that this administration seems to have handled the question very quickly.

Have you personally reviewed this matter and can you elaborate on the Department's reasoning on this question or could you assure us that it will look further into it?

Attorney General ASHCROFT. I have not personally reviewed this case or the evidence of it. The matter was handled by the U.S. attorney from the district. Obviously this is the U.S. attorney whose responsibilities have been in existence for a number of years. And the U.S. attorney came to the conclusion and recommended that the investigation be closed. That's the entirety of my understanding of the case. We left the case exactly in the posture with the same personnel, without direction, that Mr. Holder had when he was Acting Attorney General during the first interval of the Bush administration and during his previous time as the Deputy.

Mr. NADLER. Well, I would hope that it would be possible perhaps to schedule a meeting with some of your people so that maybe the Department would not leave it in the same position as the previous administration, because I don't think they handled it very well. So I hope maybe we could be exploring that further.

Attorney General ASHCROFT. We'll be glad to speak with you in regard to the matter.

Mr. NADLER. Thank you. I also want to ask a different question. I was somewhat surprised to hear you comment in response to Mr. Scott's question that a federally funded program might be able legally to discriminate on the basis of race or sex or whatever depending on who the employer was. Now, I question the constitutionality of that and I would also point out that at a recent hearing, at a May 23rd hearing on the issue of charitable choice, which is what you were referring to, the witness from a teenage counseling program, often touted by the President as an example of his ideal faith-based program, stated that while some Jewish participants in the program remained Jews, others became what he

termed completed Jews, which from a Jewish point of view is an offensive term because it implies that someone who adheres to the Jewish religion is not complete, that the Jewish religion is not complete.

Do you think it's appropriate to use taxpayer money to convert Jews into completed Jews or to advocate converting from one religion to another, which obviously is what this group does, and how do you avoid this problem if the substance abuse program uses a religious model for the basis for its cure?

Attorney General ASHCROFT. First of all, I do not believe that government resources should be used for proselytizing or evangelizing or otherwise achieving religious purposes. The purpose for which government resources should be used should be secular purposes and governmental purposes. When the Congress in enacting the charitable choice provisions in the 1996 welfare reform law provided a basis for allowing faith-based organizations to participate, the Congress specified that no such funds could be used for those purposes and, secondly, specified that in the event anyone is offended by receiving services from such an organization they have a right to get them in another setting.

Mr. NADLER. I don't want to interrupt you, but I do have one other question. I assume then this was an abuse of the program and you will look into it?

Chairman SENSENBRENNER. The gentleman's time has expired. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. Mr. Attorney General, let me just express first of all the great pleasure that I have with you serving in that—in your capacity and as a man of integrity, intelligence and grace, and I appreciate your forthright and clear testimony thus far today.

You may be aware—if you're not, the issues are technical enough. We can skip over them—but we are in a spasm of conflict in Congress over how to encourage the promulgation of broadband, and one of the issues that has been poignant has been the scope of antitrust as to broadband. In March of this year, the Justice Department together with the Federal Communications Commission filed a joint amicus curiae brief in the 11th Circuit in the case of *Intermediate Communications* v. *Bell South*.

The amicus brief was a joint DOJ and FCC commentary on the court's holding in an earlier case in the 7th Circuit which was *Goldwasser* v. *Ameritech*. The Justice Department's amicus brief argued that *Goldwasser* and its progeny are clearly in error. This Committee is now wrestling with what to do about the *Goldwasser* decision. I applaud your Department and Chairman Powell at the FCC for setting the record straight that the antitrust laws of the United States continue to apply to telecommunications providers operating under the Telecommunications Act of 1996.

The Department of Justice is also to be commended for recognizing the explicit antitrust savings clause that this Committee and the Congress included in the 1996 Telecom Act. For the benefit of the Members of this Committee, would you please summarize the Department's position on the *Goldwasser* decision and the way that decision has been interpreted by the regional Bell operating companies in subsequent litigation?

Attorney General ASHCROFT. Thank you very much. In asking the question, I think you've defined the position of the Department relatively clearly. I would just reiterate the fact that in the enactment of the 1996 telecommunications reform measures, the Congress expressed its will and intent with very substantial clarity with a savings clause indicating that the antitrust prerogatives that were in order for the enforcement authorities would remain in place. When the Courts of Appeals indicated that this was, or at least wrote an opinion which was interpreted to say this was no longer the case, we felt it very important that the Department again reiterate what the Congress had explicitly in our judgment made clear in the 1996 act, and that remains the position of the Department of Justice.

Mr. CANNON. I take it you personally also believe that, like I do, the Department of Justice should continue to play its historic role; that is, an active role, in monitoring and prosecuting anticompetitive, exclusionary or monopolistic behavior in the telecommunications industry and do you need any additional tools to pursue such violations that are occurring?

Attorney General ASHCROFT. Well, the responsibility of the Justice Department is to carry out and effect the will of the Congress as expressed in the law and it's pretty clear to me as I read the law, and I happen to have been a participant in the policy making instead of policy implementing aspect of government when the law was passed, that that's the will of the Congress, and we will do our best to serve America well by safeguarding the competitive environment which you've described. I happen to think it's a good policy to have that kind of safeguard for competition.

Mr. CANNON. Since we're considering this in the very near future, we'd appreciate any ideas that you might have about what kind of tools, what kind of clarification you would like to have from Congress.

General, during the campaign last year then candidate Bush spoke of reforming the use of secret evidence and addressing racial profiling. Congressman Issa spoke to this a bit, but can you give us a bit of a status report of where the Department is on those two issues?

Attorney General ASHCROFT. Well, secret evidence is a matter of concern to this administration because it involves a very tender balance between the need to enforce the law and the rights of individuals who are standing before the law and, frankly, where secret evidence has not been used during this administration, but this administration is eager to work with the Members of this Committee who are concerned about this question to reach an outcome which is satisfactory, that respects these counter balanced objectives of the culture.

I have forgotten the other part of the question.

Mr. CANNON. Racial profiling.

Attorney General ASHCROFT. Well, we're very active in conducting a Federal study and would be very pleased to try—and we're trying to put in place the kinds of things that would stop the Federal Government's utilization. We want the right training. We want the right kind of discipline. We want the right kind of detection measures and the right kind of remediation measures because

racial profiling doesn't belong in the Federal Government's operational arsenal.

Chairman SENSENBRENNER. The gentleman's time has expired. The gentleman from New York, Mr. Weiner.

Mr. WEINER. Thank you, Mr. Chairman. Mr. Attorney General, a couple of weeks ago I introduced a bill to reauthorize the COPS program for an additional 6 years at $1.15 billion a year. During your Senate term you cosponsored reauthorization of this bipartisan effort to keep the COPS program alive. I appreciate your support of the COPS program, but I'll admit I'm concerned and a bit confused about your recent statements about the program.

In the public record of your Senate confirmation hearing from January of this year, you were asked by Senator Biden if the COPS office will receive strong commitment from the Bush administration. I would like to read you a quote of your response in the form of a written response to Senator Biden.

"President Bush has pledged to maintain the current level of funding for the COPS program but has also pledged to increase the flexibility of the program so State and local authorities can determine where the money can best be spent."

Are you disappointed that your boss broke this promise?

Attorney General ASHCROFT. Well, I believe that the COPS program is funded so that no person, on the program and provided as a part of the program, is being deleted. It is important that when we start a program we finish a program, and the program was designed, however, to give communities a 3-year exposure to additional police resources and at the conclusion of that time allow individual communities to make a decision about whether to persist. So that the additional funding has now been moved into two areas, a more flexible area, giving localities a greater flexibility in the deployment of resources to meet their law enforcement needs and, secondly, into an area that would emphasize the school security issues.

Mr. WEINER. Mr. Attorney General, let me clarify the record. Under the Bush budget funding COPS is reduced, I repeat is reduced, from $1.37 billion in fiscal year 2001 to $855 million a year, $182 million cut, despite the President's pledge that you brought to the United States Senate. At the same time the universal hiring program, which is the main COPS program for hiring new community police, is eliminated. How the elimination of the crux of the program increases flexibility is a mystery to me. So while you're saying to State and local authorities they will have more flexibility, where more COPS money will be spent, one place it isn't going to be spent is on cops, and that is the main objection.

In addition, the COPS More program, which provides funds to acquire technology and hire civilians to free up cops from behind the desk and put them out on the street, has been stopped after the second year of what was purported to be a 3-year program, another option, another area of flexibility that has been eliminated.

As a point of fact, President Bush not only didn't increase the funding, he reduced it; didn't increase flexibility, he eliminated flexibility. How do you respond to that given the fact that you testified before the Senate that both things would not be true?

Attorney General ASHCROFT. My testimony to the Senate indicated what I thought would be the case and I believe that the President has submitted a budget which is an acceptable budget that will allow communities to meet their—assist communities in meeting their law enforcement needs.

Mr. WEINER. Attorney General, are you familiar with the Jonathan Pollard case? The case of Jonathan Pollard was someone who was convicted of spying on behalf of Israel. He's serving a life sentence despite the fact that a plea bargain had been struck saying that the Justice Department would not ask for a life sentence.

One of the reasons that sentence was imposed, Casper Weinberger, Secretary of Defense at the time, introduced a memo at the last moment and he asked for a life sentence to be imposed. That memorandum is now important to the efforts of Mr. Pollard to grant a new hearing on his sentencing. The Department of Justice has refused to turn that over to the attorneys or to me for that matter. And that was, I think, a mistaken policy. Would you agree to turn over the information so that Mr. Pollard's lawyer can pursue his rights under the law?

Attorney General ASHCROFT. I will be happy to confer with the Department about reasons, whether or not they should turn over the memo, and what the legal policy is on it.

Mr. WEINER. I appreciate that. If I can interrupt you, is there any reason why I can't have a reviewing of it?

Attorney General ASHCROFT. I don't know.

Mr. WEINER. All right. If you can let me know that as well. Thank you, Mr. Chairman.

Mr. CANNON. Mr. Chairman, I'd ask unanimous consent that immediately following my questions of the IG or the Attorney General that the amicus brief of the Department of Justice and the FCC, *Intermedia* v. *Bell South*, be included in the record.

Chairman SENSENBRENNER. Without objection, so ordered. Gentleman from Virginia, Mr. Goodlatte.

[The information referred to follows:]

No. 01-10224-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

INTERMEDIA COMMUNICATIONS, INC.,
Plaintiff-Appellant,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

INTERMEDIA COMMUNICATIONS, INC. *Plaintiff/Appellant,* v. BELLSOUTH TELECOMMUNICATIONS, INC. *Defendants/Appellants.*	CASE NO. 01-10224-JJ **CERTIFICATE OF INTERESTED PERSONS**

The undersigned, counsel for the United States, hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

BELLSOUTH TELECOMMUNICATIONS, INC.: appellee

INTERMEDIA COMMUNICATIONS, INC.: appellant

JONATHAN E. CANIS: counsel for appellant Intermedia Communications, Inc.

NANCY C. GARRISON: U.S. Department of Justice; counsel for amici

JOHN E. INGLE: Federal Communications Commission; counsel for amici

LINDA I. KINNEY: Acting Associate General Counsel, Federal Communications Commission

SUSAN L. LAUNER: Federal Communications Commission, counsel for amici

DOUGLAS P. LOBEL: counsel for appellant Intermedia Communications, Inc.

MARY JEAN MOLTENBREY: U.S. Department of Justice, counsel for amici

JOHN M. NANNES: Acting Assistant Attorney General, U.S. Department of Justice

CATHERINE G. O'SULLIVAN: U.S. Department of Justice, counsel for amici

TERESA WYNN ROSEBOROUGH: counsel for appellant Intermedia Communications, Inc.

SCOTT A. SAPPERSTEIN: counsel for appellant Intermedia Communications, Inc.

STEVEN M. SHAPIRO: counsel for appellee BellSouth Telecommunications, Inc.

CHRISTOPHER SPRIGMAN: U.S. Department of Justice, counsel for amici

J. HENRY WALKER: counsel for appellee BellSouth Telecommunications, Inc.

JOSEPH F. YENOUSKAS: counsel for appellant Intermedia Communications, Inc.

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CHRISTOPHER SPRIGMAN

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INTEREST OF THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

The United States has primary responsibility for enforcing the federal antitrust laws. Accordingly, it has a strong interest in ensuring that the Sherman Act and the Communications Act of 1934, as amended by the Telecommunications Act of 1996, are interpreted in a manner that does not improperly impede antitrust enforcement.

The Federal Communications Commission has primary responsibility for enforcing the Communications Act of 1934, as amended by the Telecommunications Act of 1996. The FCC has an interest in ensuring that the Communications Act and the antitrust laws are properly interpreted so that regulated telecommunications carriers also remain subject to antitrust liability, as Congress provided in the Telecommunications Act of 1996.

STATEMENT OF THE ISSUES

The United States and the FCC will address the following issues:

1. Whether Congress in enacting the Telecommunications Act of 1996 [1] intended to effect an implied repeal of Section 2 of the Sherman Act, 15 U.S.C. 2, with respect to allegations that an incumbent provider of telecommunications services has monopolized or attempted to monopolize a market for local exchange

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[1]Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. 151 et seq).

services through anticompetitive conduct involving the terms of access to the network.

2. Whether an incumbent provider of telecommunications services may in some circumstances violate the Sherman Act by refusing to permit a rival to interconnect on reasonable terms.

STATEMENT OF THE CASE

The complaint. Appellant Intermedia seeks to provide local telephone service in regions currently served by appellee BellSouth. In order to provide service effectively, Intermedia must interconnect with BellSouth's telephone network. Intermedia's complaint in this case alleges, *inter alia*, that although it and BellSouth entered into an interconnection agreement in June 1996, BellSouth failed to perform on that agreement to the extent necessary to allow Intermedia to provide competitive service. This failure, Intermedia alleges (Compl. ¶¶ 131-37), violated BellSouth's duty to interconnect its network and facilities with those of Intermedia under Sections 251(a), 251(c), 251(g), and 252(d) of the Telecommunications Act of 1996 ("TCA" or "the Act"), 47 U.S.C. 251(a), 251(c), 251(g), 252(d), and constituted an unjust and unreasonable practice under Section 201(b) of the Communications Act, 47 U.S.C. 201(b).

Intermedia also alleges that BellSouth's conduct constituted monopolization

(Compl. ¶¶ 166-80) and attempted monopolization (Compl. ¶¶ 181-87), in violation of Section 2 of the Sherman Act, 15 U.S.C. 2.[2] In particular, it alleges that BellSouth "possesses monopoly power within the relevant market" (Compl. ¶ 167) and that BellSouth has maintained that monopoly power by "intentionally engaging in . . . anti-competitive conduct . . . including, but not limited to: (1) willfully refusing to commit adequate resources and manpower to assure that Intermedia could interconnect with BellSouth's network and facilities; (2) refusing to make required reciprocal compensation payments to Intermedia for . . . calls [to Internet service providers]; and (3) fraudulently inducing Intermedia to . . . drastically reduce BellSouth's reciprocal compensation obligations to Intermedia." Compl. ¶ 171. Additionally, Intermedia claims that "BellSouth's cooperation is indispensable to effective competition," that it is "technically and economically feasible for BellSouth to provide access," and that "BellSouth's refusal to deal with Intermedia by denying it meaningful access" to "essential facilities and information, contrary to contract, statute, and federal regulations, is an anti-competitive act calculated by BellSouth to harm competition in the relevant markets and retain its monopoly." Compl. ¶ 177.

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[2]Intermedia's complaint further alleges breach of contract, fraud, and tortious interference with prospective economic advantage.

As a result of BellSouth's conduct, Intermedia alleges, it has been "effectively denied participation in the relevant market." Compl. ¶¶ 173, 179, 186. Moreover, "consumers in the relevant market have been harmed because they have been deprived of the benefits of meaningful competition for the provision of telecommunications services, which would produce lower prices and improve service for those consumers." Compl. ¶¶ 174, 180, 187.

BellSouth moved to dismiss the complaint. Memorandum of Law in Support of BellSouth's Motion to Dismiss (August 15, 2000). Citing the Seventh Circuit's recent decision in *Goldwasser* v. *Ameritech*, 222 F.3d 390 (7th Cir. 2000), BellSouth argued that the antitrust claims were "inextricably tied to BellSouth's [alleged non-performance of its] obligations under the Telecommunications Act," and that "alleged violations of the Act cannot support a federal antitrust claim." *Id.* at 2, 7-9. BellSouth further argued that the *Goldwasser* analysis bars even antitrust claims which are not "strictly speaking, based solely on the alleged failure to comply with the Telecommunications Act," *id.* at 8, and that Intermedia's Sherman Act claims are foreclosed by an implied antitrust immunity arising from the pervasive regulatory scheme established by the TCA. *Id.* at 10-11. In response, Intermedia represented that its antitrust claims were independent of the TCA's interconnection requirements. Intermedia's Opposition to BellSouth's Motion to

Dismiss at 8-9 (September 18, 2000).

The district court's order. The district court granted the motion to dismiss as to the antitrust claims. Order at 10 (December 15, 2000). The court's opinion focuses primarily on BellSouth's argument that violations of the Act do not provide a basis for an antitrust claim under the holding in *Goldwasser*. *Id.* at 5-6. The district court acknowledged this Court's holding in *AT&T Wireless PCS, Inc.* v. *City of Atlanta*, 210 F.3d 1322 (11th Cir. 2000), *vacated on other grounds*, 223 F.3d 1324 (11th Cir. 2000), that the general savings clause of the TCA establishes Congress' intent to permit recovery for TCA violations under 42 U.S.C. 1983, but it found that decision reconcilable with *Goldwasser*. Noting that the Seventh Circuit reasoned that the Act imposes on incumbent local exchange companies certain affirmative duties to cooperate with competitors that the antitrust laws do not, Order at 5, the district court concluded that *Goldwasser* stands for the proposition that "a violation of the TCA cannot automatically be the basis for an antitrust claim, since there would be no antitrust claim in the absence of the TCA (because without the TCA, there is no obligation to help one's competitors)." *Id.* at 6.

On the other hand, the district court concluded, "other behavior that could be the basis for an antitrust claim, regardless of whether the TCA existed, is not immune from antitrust liability even though it also violates the TCA." *Id.* This

conclusion, it observed, is consistent with *AT&T Wireless*, "which notes that nothing in the TCA modifies or impairs antitrust liability." *Id.* "Thus, any behavior that can be the basis for an antitrust claim before the creation of the TCA still can be the basis for an antitrust claim after the creation of the TCA." *Id.*

Turning to the allegations in Intermedia's complaint, the court opined that "most of the allegations that serve as a basis for the antitrust claims involve violations of the TCA, but as discussed above, violations of the TCA do not automatically serve as a basis for an antitrust claim." *Id.* at 6-7. Despite Intermedia's contention that its Sherman Act claims were not based on the theory that violations of the TCA automatically constitute antitrust violations, the court provided no further explanation for its dismissal of the antitrust claims, except with respect to Intermedia's allegation that BellSouth had "refuse[d] to make required reciprocal compensation payments to Intermedia for . . . calls [to Internet service providers]."[3]

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[3]Compl. ¶171. The district court characterized this allegation as focusing on BellSouth's decision to appeal state public utility commission decisions directing BellSouth to make the disputed payments. It concluded that the appeals were not baseless and were therefore immune from antitrust scrutiny under the Supreme Court's decisions in *California Motor Transportation Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972), and *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). Order at 7-8.

SUMMARY OF ARGUMENT

In enacting the TCA, Congress sought to foster competition in local and long distance telecommunications. *AT&T Wireless*, 210 F.3d at 1324. The Act thus is designed to serve the same purpose as the federal antitrust laws, albeit by complementary and not identical means. Accordingly, there would be no reason to recognize an implied antitrust exemption for anticompetitive conduct in telecommunications markets even if Congress had not expressly addressed that question. In fact, however, Congress "took pains" to demonstrate its intent not to effect a repeal of the Sherman Act with respect to such conduct by including an express antitrust savings clause, in addition to a general savings clause. *Id.* at 1329. Nonetheless, dicta in the Seventh Circuit's *Goldwasser* decision have created some confusion about the relationship between the federal antitrust laws and the TCA. Those dicta have encouraged incumbent providers of local telecommunications services to argue, as BellSouth did below, that their conduct is not subject to Sherman Act scrutiny.

The United States and the FCC believe that it is essential that the developing case law reflect an appropriate reconciliation of the TCA and the Sherman Act, affording the public the benefits of all of the tools Congress has chosen to foster competition in this critical sector of the economy. The district court in this case

correctly stated the law: conduct that would have violated the Sherman Act before enactment of the TCA is still prohibited by the Sherman Act, whether or not it also violates the TCA. In so doing, the district court implicitly rejected BellSouth's argument that enactment of the TCA impliedly repealed Section 2 of the Sherman Act with respect to anticompetitive conduct involving competitors' access to local telecommunications networks. That implicit holding should be expressly affirmed by this Court.

The district court also appears to have rejected BellSouth's argument that antitrust remedies are incompatible with the procedures mandated by the TCA to promote competition in local telecommunications markets and that such incompatibility requires dismissal of the antitrust claims in this case. The speculative possibility that an antitrust injunction could interfere with the regulatory framework provides no basis for a general policy of dismissing on the pleadings antitrust cases seeking injunctive and damage relief, especially given the Act's explicit provision that the Sherman Act continues to apply.

It is not clear from the district court's order why it dismissed Intermedia's antitrust claims in their entirety, in light of Intermedia's representation that its claims do not rest on the proposition that a TCA violation automatically establishes a Sherman Act violation. The court's statement that "without the TCA, there is no

obligation to help one's competitors," Order at 6 (citing *Goldwasser*), suggests that the district court erroneously believed that an incumbent monopoly provider of local telecommunications services could never violate the Sherman Act by refusing to provide rivals access to its network on reasonable terms. To the contrary, under well established antitrust doctrine, a monopolist's refusal to deal with a rival without a legitimate business justification may, in certain circumstances, violate Section 2 of the Sherman Act. Although Intermedia's complaint could have been clearer, we believe that it suffices to state a claim.

ARGUMENT

I. CONGRESS HAS AFFIRMED THE AVAILABILITY OF ANTITRUST LAW TO ADDRESS EXCLUSIONARY CONDUCT BY AN INCUMBENT PROVIDER OF LOCAL TELECOMMUNICATIONS SERVICES

As the Seventh Circuit observed in *Goldwasser*, the TCA was intended to "bring the benefits of deregulation and competition to all aspects of the telecommunications market in the United States, including especially local markets." *Goldwasser*, 222 F.3d at 391. *See also AT&T Wireless*, 210 F.3d at 1324. The Act added a new Part II, entitled "Development of Competitive Markets," to Title II of the Communications Act of 1934. *See* 47 U.S.C. 251 et seq. Section 251 requires all telecommunications carriers to interconnect with other carriers, and specifically requires incumbent local exchange carriers to comply with a series of obligations

designed to facilitate entry by competing local exchange carriers. 47 U.S.C. 251. The Act also specifies procedures pursuant to which agreements relating to those obligations are to be formulated and approved, 47 U.S.C. 252, and makes provision for other aspects of local exchange service, including the removal of barriers to entry resulting from State or local regulation, 47 U.S.C. 253.

Despite the procompetitive congressional intent, and the absence of any express indication that Congress intended any repeal of the antitrust laws with respect to local exchange telecommunications, BellSouth argued below that the court should recognize a broad antitrust immunity for an incumbent local exchange carrier's allegedly exclusionary conduct because the TCA is "a pervasive regulatory scheme [that] would be disrupted by antitrust enforcement." Memorandum of Law in Support of BellSouth's Motion to Dismiss at 10. The district court properly did not adopt that position, holding instead that conduct that would have violated the Sherman Act prior to 1996 remains subject to challenge under the antitrust laws.

A. THE PLAIN LANGUAGE OF THE TELECOMMUNICATIONS ACT MAKES CLEAR THAT THE ACT DOES NOT CONFER ANTITRUST IMMUNITY

BellSouth's implied immunity arguments run directly into two provisions of the Telecommunications Act expressly stating Congress' intent that the Act not give rise to any antitrust immunity. Section 601(c)(1), the general savings clause,

provides that "[t]his Act . . . shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." Pub. L. No. 104-104, Title VI, § 601(c)(1), 110 Stat. 143. Section 601(b)(1) specifically provides that "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Pub. L. No. 104-104, Title VI, § 601(b)(1), 110 Stat. 143.

As this Court emphasized in *AT&T Wireless*, 210 F.3d at 1327-28, the plain language of a statute is normally controlling, and Congress is "at liberty to leave other remedial avenues open," even when it provides a comprehensive remedial scheme through a statute such as the TCA. Thus, in holding that the TCA posed no obstacle to recovery under 42 U.S.C. 1983, this Court read the general savings clause to "forbid[ ] [it] from construing the TCA to 'modify, impair, or supersede' other laws," and declined to "second guess the plain meaning of this language." *Id.* at 1328. In light of Congress' decision to include an additional savings clause directed specifically to the antitrust laws, there is even less reason to second guess Congress' decision here. *See Goldwasser*, 222 F.3d at 390 (disclaiming any holding that the TCA "confers implied immunity on behavior that would otherwise violate the antitrust law" because such a conclusion "would be troublesome at best given the antitrust savings clause in the statute"); Order Regarding Issues for Trial at 2

(October 25, 2000), *Caltech Int'l Telecom Corp.* v. *Pacific Bell* (N.D. Cal.) (No. C-97-2105-CAL) ("The Telecommunications Act does not 'impair' application of the antitrust laws to the telecommunications industry.") (Attached as Addendum A).

The legislative history confirms the plain meaning of the savings clauses -- that Congress did not wish to effect an implied repeal of the antitrust laws. *See* H.R. CONF. REP. NO. 104-458, at 201 (1996) (an "underlying theme[]" of the 1996 Act is that the Federal Communications Commission "should be carrying out the policies of the Communications Act, and the DOJ should be carrying out the policies of the antitrust laws"). Moreover, this understanding that Congress intended the antitrust laws to apply to anticompetitive conduct impeding the development of competition in local telecommunications is widely shared. The FCC has consistently and expressly taken the position that the antitrust laws play a role complementary to the procompetitive deregulatory framework of the Act. *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 61 Fed. Reg. 45476, 45494 (1996) ("nothing in . . . our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws").

Indeed, even BellSouth has acknowledged that the Act does not repeal the federal antitrust laws. In seeking authority from the FCC to begin providing long

distance service in Louisiana pursuant to the TCA (which requires a Bell operating company seeking to provide long distance services to show that its local exchanges have been opened to competition (*see* 47 U.S.C. 271)), BellSouth argued that the FCC should take into account the fact that "[a]ll of the Act's and the Commission's specific statutory and regulatory protections are backed up by federal and state antitrust laws. The weighty corporate and personal penalties (including imprisonment) that may be levied against violators of the antitrust laws . . . make it most unlikely that Bell company managers would order unlawful practices." Brief in Support of Second Application by BellSouth For Provision of In-Region, InterLATA Services in Louisiana at 100 (July 9, 1998) (attached as Addendum B).[4]

In light of the clear language of the antitrust savings clause, there is no need for the Court to go any farther before rejecting BellSouth's plea for antitrust

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[4]BellSouth argued below that "[t]he fact that the antitrust laws continue to apply does not mean that the Act reserves only antitrust liability but not antitrust defenses." BellSouth's Reply to Intermedia's Opposition to Motion to Dismiss at 7 (October 5, 2000). But, prior to the passage of the TCA, courts uniformly held that the Communications Act did not immunize regulated carriers from the antitrust laws for conduct involving a denial of access to the local network. *See MCI Communications* v. *AT&T*, 708 F.2d 1081, 1104-05 (7th Cir. 1983); *Phonetele* v. *AT&T*, 664 F.2d 716, 732-35 (9th Cir. 1981); *United States* v. *AT&T*, 461 F. Supp. 1314, 1326-27 (D.D.C. 1978). There was thus no pre-1996 implied immunity defense to "reserve." And the express savings clauses Congress chose to include in the Telecommunications Act cannot reasonably be interpreted to mean that courts should determine whether that Act impliedly repeals the antitrust laws without reference to the savings clauses.

immunity. But even if the Court is inclined to undertake the kind of analysis courts have employed where Congress has provided less clear guidance, that analysis leads inexorably to the same result.

B. IMPLIED ANTITRUST IMMUNITIES ARE DISFAVORED, AND WHEN FOUND AT ALL ARE STRICTLY LIMITED

"[E]xemptions from the antitrust laws . . . are strongly disfavored," *Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409, 421 (1986). This well established principle reflects the status of the antitrust laws as a "'fundamental national economic policy.'" *Nat'l Gerimedical Hosp. & Gerontology Center* v. *Blue Cross*, 452 U.S. 378, 388 (1981), quoting *Carnation Co.* v. *Pac. Westbound Conference*, 383 U.S. 213, 218 (1966). It also reflects the cardinal rule of statutory construction that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). Accordingly, implied antitrust immunity "'can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.'" *Nat'l Gerimedical*, 452 U.S. at 388, quoting *United States* v. *Nat'l Assoc. of Sec. Dealers*, 422 U.S. 694, 719-20 (1975) ("*NASD*"). In particular, "'Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even

then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.'" *Id.* at 389, quoting *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 357 (1963).

In applying these principles, even in the context of heavily regulated industries, the Supreme Court has "refused . . . a blanket exemption, despite a clear congressional finding that some substitution of regulation for competition was necessary," *id.* at 392, citing *Carnation*, 383 U.S. at 217-19 (declining to find "an unstated legislative purpose to free the shipping industry from the antitrust laws"); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 373-74 (1973) (finding no legislative "purpose to insulate electric power companies from the operation of the antitrust laws" despite Federal Power Commission regulation). Instead, to justify immunity, a defendant must convincingly show a "clear repugnancy" between the applicable regulatory scheme and enforcement of the antitrust laws. *Gordon* v. *New York Stock Exch.*, 422 U.S. 659, 682 (1975).

C. THERE IS NO CLEAR REPUGNANCY BETWEEN APPLICATION OF THE SHERMAN ACT AND THE REGULATORY FRAMEWORK OF THE TELECOMMUNICATIONS ACT OF 1996

As then-Judge Kennedy explained in rejecting a telecommunications provider's argument for implied antitrust immunity based on regulation of the standards for interconnection to the network, "[t]he rules for implying antitrust

immunity on the basis of regulatory statutes reflect two broad concerns: the agency must have sufficient freedom of action to carry out its regulatory mission, and the regulated entity should not be required to act with reference to inconsistent standards of conduct." *Phonetele*, 664 F.2d at 732-35, citing *NASD*, 422 U.S. at 722-25; *Gordon*, 422 U.S. at 689. Neither concern provides any justification for implied antitrust immunity in this case.

Because the TCA and the Sherman Act are both designed to foster competition, there is no "clear repugnancy" between enforcement of the regulatory statute and enforcement of the antitrust laws. In contrast to *NASD* and *Gordon*, this case does not involve a regulatory agency granted statutory authority to approve, in furtherance of other regulatory goals, anticompetitive conduct that would otherwise violate the antitrust laws. Rather, as the Seventh Circuit emphasized in *Goldwasser*, the TCA imposes specific obligations on incumbent local exchange carriers to assist competing carriers in ways that the antitrust laws would not necessarily require. Neither, on the other hand, would the antitrust laws prohibit such assistance. There is no reason to anticipate, therefore, that enforcement of the antitrust laws would pose an obstacle to the FCC or state authorities carrying out their regulatory missions under the TCA or subject incumbent local exchange carriers to inconsistent standards of conduct.

The mere fact of overlapping authority does not justify implied antitrust immunity. *See, e.g., Otter Tail,* 410 U.S. at 373-74 (Federal Power Commission had regulatory authority over power company); *Phonetele,* 664 F.2d at 733-34 ("To permit a court additionally to hold [conduct that the FCC had held unreasonable under the public interest standard] unlawful under the Sherman Act does not jeopardize any policy adopted by the agency."). This is not to say that it is impossible for situations to arise in which questions of regulatory policy might become relevant to the antitrust analysis. But courts are capable of finding ways to avoid conflict with regulatory policy. The mere possibility of such situations arising cannot justify recognition of an implied antitrust exemption, in light of the clear congressional policy expressed in the antitrust savings clause and the utter lack of "clear repugnancy" between these "competition-friendly" statutes (*Goldwasser*, 222 F.3d at 391).

D. THE SPECULATIVE POSSIBILITY OF CONFLICT BETWEEN AN ANTITRUST INJUNCTION AND THE REGULATORY FRAMEWORK OF THE TELECOMMUNICATIONS ACT PROVIDES NO BASIS FOR DISMISSING ANTITRUST CASES AT THE PLEADING STAGE

In pressing its implied immunity argument before the district court, BellSouth relied heavily on the following dicta from *Goldwasser*:

> [W]hen one reads the complaint as a whole [Goldwasser's] allegations appear to be inextricably linked to the claims under the [TCA]. Even if

> they were not, such a conclusion would then force us to confront the question whether the procedures established under the [TCA] for achieving competitive markets are compatible with the procedures that would be used to accomplish the same result under the antitrust laws. In our view, they are not. The elaborate system of negotiated agreements and enforcement established by the [TCA] could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action. Court orders in those cases could easily conflict with the obligations the state commissions or the FCC imposes . . . . The [TCA] is, in short, more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field.

222 F.3d at 401.

The meaning of this passage is unclear, particularly in view of the Seventh Circuit's express disclaimer of any holding "that the 1996 Act confers implied immunity on behavior that would otherwise violate the antitrust law," and its acknowledgment that "[s]uch a conclusion would be troublesome at best given the antitrust savings clause in the statute." *Id.* at 401. The court may have meant that while the TCA had no effect on the scope of antitrust *liability*, courts are nonetheless advised when considering antitrust *remedies* to avoid disruption to the statutory scheme. *See Essential Communications Sys., Inc.* v. *AT&T*, 610 F.2d 1114, 1120-21 (1979) (although Communications Act does not confer blanket antitrust immunity, "[w]e recognize . . . that a given antitrust remedy might in specific instances present an actual or potential conflict with a duty imposed by the

FCC"). *See also Otter Tail*, 410 U.S. at 381 (a court, in fashioning antitrust remedy, "should [not] be impervious to [regulated utility's] assertion that compulsory interconnection . . . will erode its integrated system and threaten its capacity to serve adequately the public"); *MCI*, 708 F.2d at 1105-06 (same).

We agree that courts should attempt to avoid conflict with regulatory policy in fashioning antitrust injunctions. The speculative possibility that an injunction could ultimately be entered in this case, however, scarcely justifies dismissing a complaint seeking damages and injunctive relief at the pleadings stage. To the extent that BellSouth seeks to use the *Goldwasser* dicta as support for a "back door" form of implied antitrust immunity, that argument should be decisively rejected by this Court. *Cf.* Order Dismissing Claims Under Telecommunications Act of 1996 at 2 n.1 (September 21, 2000), *Electronet Intermedia Consulting, Inc.* v. *Sprint-Florida, Inc.* (N.D. Fla.) (No. 4:00cv1176-RH) ("I cannot say, based solely on the complaint and with no factual record at all . . . that any conduct [plaintiff] proves that otherwise would constitute an antitrust violation should be deemed non-actionable because enforcing the antitrust laws would somehow be inconsistent with the Telecommunications Act.") (Attached as Addendum C).

II. MAINTENANCE OF A LOCAL EXCHANGE MONOPOLY THROUGH EXCLUSIONARY AND ANTICOMPETITIVE CONDUCT COULD VIOLATE SECTION 2 OF THE SHERMAN ACT

The district court correctly held that "any behavior that can be the basis for an antitrust claim before the creation of the TCA still can be the basis of an antitrust claim after the creation of the TCA." Order at 6. Nevertheless, the court dismissed the complaint for failure to state a claim under the Sherman Act. The court's rationale is unclear. It described *Goldwasser* as holding that "a violation of the TCA cannot automatically be the basis for an antitrust claim, since there would be no antitrust claim in the absence of the TCA (because without the TCA, there is no obligation to help one's competitors)." *Id.* at 6. However, it offered no explanation for its conclusion that Intermedia's allegations concerning the terms on which BellSouth granted it access to the network failed to state a claim under the Sherman Act, save the statement that "most of the allegations that serve as a basis for the antitrust claims involve violations of the TCA, but as discussed above, violations of the TCA do not automatically serve as a basis for an antitrust claim." *Id.* at 6-7.

Although it is true that a firm is generally free to refuse to deal with its competitors, *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Olympia Equip. Leasing* v. *W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986), that freedom is not without limits. In some circumstances, a monopolist's refusal to

deal with a rival on reasonable terms does violate Section 2 of the Sherman Act. *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985).

Section 2 of the Sherman Act prohibits (1) the willful acquisition or maintenance of monopoly power (2) by the use of exclusionary or predatory conduct "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak*, 504 U.S. at 482-83, quoting *United States* v. *Griffith*, 334 U.S. 100, 107 (1948). Exclusionary conduct is conduct that "'not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.'" *Aspen*, 472 U.S. at 605 n.32, quoting 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 626b, at 78 (1978). If "valid business reasons" do not justify conduct that tends to impair the opportunities of a monopolist's rivals, that conduct is exclusionary. *See Eastman Kodak*, 504 U.S. at 483; *Aspen*, 472 U.S. at 605.

In *Aspen*, the Supreme Court upheld a jury verdict finding an antitrust violation when a firm that controlled three of the four downhill skiing mountains in Aspen, Colorado, terminated its participation in an all-Aspen skiing pass with the company that controlled the fourth mountain and took other actions designed to

prevent its rival from marketing its own all-Aspen pass. The Court upheld liability based on the jury's reasonable finding that the monopolist's refusal to deal was not "justified by any normal business purpose," *Aspen*, 472 U.S. at 608, but could be explained only as an anticompetitive strategy involving a "sacrifice [of] short-run benefits and consumer goodwill" in the interest of excluding a rival and reducing competition, *id.* at 610-11. *See also Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (approving the entry of an injunction ordering a monopolist newspaper to print the advertisements of customers who also dealt with a small local radio station); *Otter Tail*, 410 U.S. at 377 (monopolist power utility's refusal to provide wholesale power to municipally owned distribution systems in order "to destroy threatened competition" violated Sherman Act); *MCI*, 708 F.2d at 1133 (AT&T violated the antitrust laws by failing to afford a competing long-distance telephone service provider interconnection to local exchanges, contrary to federal regulatory policy and without legitimate business or technical reason for denying the requested interconnection).[5] Under the case law, then, it is not necessarily true that "without

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[5] *See also* Order Regarding Issues for Trial at 2-3 (October 25, 2000), *Caltech Int'l Telecom Corp.* v. *Pacific Bell* (N.D. Cal.) (No. C-97-2105-CAL) (refusing to dismiss Sherman Act claims based on interconnection dispute: "[T]he Telecommunications Act gives plaintiffs the *right* to compete using defendant's facilities and services. But plaintiff here has alleged, and must prove, that in violating plaintiff's right, defendant has violated the antitrust laws.") (attached as Addendum A).

the TCA, there is no obligation to help one's competitors." Order at 6.

Goldwasser is not to the contrary. In that case, the court of appeals affirmed dismissal of Sherman Act claims that were, "as a whole . . . inextricably linked to . . . claims under the 1996 Act." *Goldwasser*, 222 F.3d at 401. The court noted that "the duties the 1996 Act imposes on [incumbent local exchange providers] are [not] coterminous with the duty of a monopolist to refrain from exclusionary practices." *Id.* at 399. The court also acknowledged that a monopolist's decision not to deal with a competitor "for the sole purpose of driving its rival out of the market amounted to a violation of Section 2," *id.* at 398 (citing *Aspen*, 472 U.S. at 600).

Most disputes over the terms on which potential rivals may obtain access to an incumbent's network will not provide a basis for a finding of antitrust liability. As the Supreme Court made clear in *Aspen*, it is not sufficient to make out a violation of the Sherman Act that a monopolist's conduct adversely affected a particular rival. 472 U.S. at 605. The antitrust laws protect competition, not competitors, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), and so a plaintiff alleging unlawful monopoly maintenance must establish that the allegedly exclusionary conduct reasonably appeared capable of making a significant contribution to the maintenance of the defendant's monopoly power. 3 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651c, at 78 (1996).

This would, of course, require consideration both of the conduct's impact on the plaintiff's ability to compete and the prospects of competition from other sources. Moreover, as we have noted, conduct is not deemed exclusionary for purposes of Section 2 of the Sherman Act unless it lacks a valid business purpose; i.e., it makes no business sense apart from its tendency to exclude and thereby create or maintain market power.

Intermedia's lengthy complaint could have been clearer with respect to its antitrust claims. Nonetheless, if read with the liberality appropriate when deciding a motion under Rule 12(b)(6),[6] the complaint includes all of the factual allegations required to state a claim under Section 2. Intermedia alleges that BellSouth "possesses monopoly power within the relevant market" (Compl. ¶ 167), and that BellSouth has maintained that monopoly power by virtue of a "premeditated and concerted course of conduct to eliminate its competitors." Compl. ¶¶ 2, 171. Intermedia further alleges that it cannot compete without access to BellSouth's network, and that "BellSouth's cooperation is indispensable to effective competition." Compl. ¶ 177. With respect to the possible business justifications for

[6]Antitrust complaints are to be given a liberal construction at the pleading stage, and "should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 811 (1993) (internal quotation marks omitted).

BellSouth's alleged failure to provide reasonable interconnection, Intermedia claims that it is "technically and economically feasible for BellSouth to provide access," and that "BellSouth's refusal to deal with Intermedia by denying it meaningful access" to "essential facilities and information, contrary to contract, statute, and federal regulations, is an anti-competitive act calculated by BellSouth to harm competition in the relevant markets and retain its monopoly." *Id.*

As a result of BellSouth's conduct, Intermedia alleges, it has been "effectively denied participation in the relevant market." Compl. ¶¶ 173, 179, 186. In particular, Intermedia alleges that BellSouth's failure to provide reasonable interconnection has prevented Intermedia from "expand[ing] [its] customer base" and "has continually eroded [its] existing customer base." Compl. ¶ 47. The complaint further alleges, although not with great specificity, that BellSouth's conduct has harmed competition as well as Intermedia itself. It states that BellSouth has used its monopoly power "to preclude direct, competitive, and meaningful dealings by Intermedia *and other would-be competitors* with BellSouth's customers in the relevant market," Compl. ¶ 168 (emphasis added), and that "consumers in the relevant market have been harmed because they have been deprived of the benefits of meaningful competition for the provision of telecommunications services, which would produce lower prices and improve service for those consumers." Compl. ¶¶

174, 180, 187. *See also* Compl. ¶ 50 ("BellSouth's actions have harmed both Intermedia and the public.").

In sum, the complaint alleges exclusionary conduct by a firm with monopoly power that lacks business justification and that harms competition. It will, of course, be Intermedia's burden to flesh out the allegations in further proceedings, but we believe that it has provided enough detail to state a claim under Section 2.

CONCLUSION

The Court should reject any argument that the Telecommunications Act of 1996 creates implied antitrust immunity. For the reasons outlined in Part II of this brief, the Court should vacate the district court's order dismissing Intermedia's complaint, and remand for further proceedings.

Respectfully submitted.

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CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with Fed. R. App. P. 32(a)(7)(B)(i). It has 5805 words printed in 14 point proportionally spaced serif type.

Christopher Sprigman

CERTIFICATE OF SERVICE

I, Christopher Sprigman, hereby certify that on this 28th day of March 2001, I caused to be served a copy of BRIEF FOR UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION AS AMICI CURIAE IN SUPPORT OF APPELLANT by first-class mail on the following:

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Mr. GOODLATTE. Thank you, Mr. Chairman. General Ashcroft, welcome to the Committee. We are delighted to have you here. We appreciate your taking all this time to address such a wide range of issues, and I also want to thank you and commend you for your outreach to the Congress as a whole, something that you are particularly well suited to do but on two occasions I have had the opportunity to be in your office, one to individually speak with you at length on issues of concern to the Committee and to myself and the other occasion a bipartisan meeting that you initiated, which not only I think helped to promote a dialogue between the executive branch and the Congress but also helped to promote some discussion right here in the Committee on—I think we found some common ground on some issues that we may well be able to address and I haven't seen that kind of outreach during my time in the Congress. So I thank you. I do have a couple of issues I'd like to ask you about.

First, I was pleased to hear that you intend to enforce the obscenity laws already on the books. The failure of the previous administration to enforce those laws has led to a proliferation of obscenity both on-line and off, and I am particularly concerned about the safety of our children on the Internet, where they're subjected to child pornography and solicitation in a massive way, and I'd like to know to what extent the Justice Department will use its resources to assist State and local law enforcement in combatting this cyber attack on our Nation's children.

Attorney General ASHCROFT. I thank you for the question. I am concerned about obscenity and I'm concerned about obscenity as it relates to our children. The electronic data transmission revolution

has revolutionized certain kinds of criminal activity, and the technology involved in it makes it much more difficult for limited law enforcement agencies like small county prosecutors and frequently local enforcement operations to operate as effectively as they might otherwise if the digital universe were not involved.

We pride ourselves on cooperating to enforce laws with State and local authorities, but particularly in areas where the Federal Government has the kind of technology and technological awareness related to cyber crime and its many manifestations in different areas, we try to be especially accommodating to local law enforcement, to assist them, and I would think that would be an objective of ours in this respect.

Mr. GOODLATTE. Thank you, General Ashcroft. The second question I have relates to on-line piracy, the theft in either the sale or in many cases the wholesale giving away of valuable copyrighted material on the Internet. A few years ago I introduced legislation which passed the Congress and was signed into law called the NET Act, or No Electronic Theft Act, which gave the Justice Department considerably greater law enforcement tools to combat this serious growing problem of protecting valuable intellectual property on the Internet, and so far there has been very little action, I think there's just been a handful of prosecutions in this area, and I wonder if the Justice Department and you could commit to a greater, beefed up effort to enforce that law and combat the multibillion dollar theft of valuable intellectual property on the Internet.

Attorney General ASHCROFT. Well, frankly, as you know, the NET Act assists the Department by addressing a new form of crime, large scale distribution of pirated software and copyrighted materials over the Internet where the infringer does not act out of a pure profit motive. Sometimes these infringers are just with a mischievous, but malicious intent giving away the property of other people. And we are interested in making sure that we do what we can to curtail that and we launched a joint intellectual property enforcement initiative in the Department over a year ago and I would expect that initiative to begin to bear fruit.

Uniquely, the United States of America is the source of much of the really valued intellectual property that is important around the world and if it becomes available without cost as a result of privacy or without compensation to those who create it, we will simply destroy the capacity for this culture to generate and continue to be the generators of the leading edge in technology and information processing.

Chairman SENSENBRENNER. The gentleman's time has expired.

On the subject of enforcement of the Federal criminal obscenity statutes, at this point I would like to ask unanimous consent to insert into the record a letter which I wrote on February 15th to the Attorney General relative to a report on the statute and the response dated May 3rd from Cheryl L. Walter, Acting Assistant Attorney General to my letter, and without objection, they are included.

Then we have the gentleman from Massachusetts, Mr. Delahunt.

[The information referred to follows:]

U.S. House of Representatives

Committee on the Judiciary

Washington, DC 20515–6216

One Hundred Seventh Congress

February 15, 2001

The Honorable John Ashcroft
Attorney General
U.S. Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear General Ashcroft:

I write to request the Justice Department's response to the following questions concerning the enforcement of federal criminal obscenity statutes (18 U.S.C. § 1460 et seq.) and enforcement of the record keeping requirements relating to the production of sexually explicit material (18 U.S.C. § 2257 and 28 C.F.R. § 75.1 et seq.). It has come to my attention that a recent article in the trade publication for the pornography industry stated that there has been no enforcement of section 2257 since July 1995 and that there has been little or no enforcement of sections 1460 - 1470. The answers to these questions will assist the Committee in evaluating whether the Department is adequately utilizing these important prosecution tools provided by Congress.

1. How many prosecutions of major producers or distributors of obscenity (those grossing more than $50,000 per year), have been initiated and filed by the Department of Justice since January 1993? For each prosecution, please enclose a copy of the indictment and/or information and the disposition of the case.

2. Since January 1993, how many times has the Department of Justice, pursuant to 28 C.F.R. § 75.5, inspected the records of any producer of materials regulated by 18 U.S.C. § 2257 and 28 C.F.R. § 75.1 et seq?

3. How many violations of 18 U.S.C. § 2257 and 28 C.F.R. § 75.1 et seq. have been uncovered since January 1993?

4. Since January 1993, how many violations of 18 U.S.C. § 2257 have been prosecuted?

Thank you for your attention to this request. I look forward to your prompt response.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

cc: The Honorable John Conyers, Jr.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC 20530

MAY 3 2001

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter to the Attorney General concerning the enforcement of federal criminal obscenity statutes (18 U.S.C. §§ 1460 *et seq.*) and enforcement of record keeping requirements related to the production of sexually explicit materials pursuant to 18 U.S.C. § 2257.

In response to your request for information regarding prosecutions of major producers or distributors (those grossing more than $50,000) per year, we have identified 12 major cases brought from Fiscal Year 1993 to the present.

Set out below are synopses of 12 major cases we have identified that were indicted from FY 1993 to the present. We are including corresponding indictments as enclosures. We were not able to retrieve a copy of the indictment in the Hicks case, but have enclosed a copy of our appellate brief, which outlines the charges and facts. Convictions were obtained in all but one case. You will note that the Criminal Division's Child Exploitation and Obscenity Section (CEOS) participated in the prosecution of several of these cases.

1. United States v. Anthony Peraino, et al. (D.Nevada). Initially indicted in 1992, and superseded in 1994, the case resulted in an acquittal when it finally went to trial in 1995.

2. United States v. Creamer, et al. (D.Arizona). In 1997, CEOS indicted Creamer and three of his management employees in Tucson on charges of distributing child pornography and obscenity, money laundering, tax evasion, structuring and

firearms charges. All but Creamer entered into plea agreements. Creamer became a fugitive in the fall of 1997 and is still at large. The government obtained the forfeiture of several hundred thousand dollars of assets through administrative and civil forfeiture actions.

3. United States v. Morton Gordon (N.D.FL.). Gordon was president of Bizarre Video and Bean Blossom, Inc., the largest distributors of sexually explicit bondage videos in the country. In a case handled by the CEOS, the defendant and government reached a plea agreement in 1998 that required the defendant to enter a plea to one count of interstate transportation of obscene matter. The defendant was sentenced to 13 months in prison, suspended, and fined $30,000. The other part of this case concluded with a corporate plea in the Middle District of Florida, in which Bizarre Video forfeited $250,000 of assets to the United States.

4. United States v. William Perry and PM Productions, Inc. (N.D.FL.). Perry was the president of PM Productions, Inc., a national distributor of sexually explicit materials out of New Jersey. Through the joint efforts of CEOS and the United States Attorney's Office for the Northern District of Florida, Perry pled guilty in 1996 to one count of interstate transportation of obscene material and was sentenced to three years incarceration. Along with the conviction came the forfeiture of several hundred thousand dollars of real estate and destruction of PM Production's inventory.

5. United States v. Northstar Distributors, Inc. (D.Nevada). Northstar was a Rhode Island company that distributed its obscene materials nationwide. During an investigation of Kenneth Guarino, a principal in Northstar, for tax violations, CEOS was contacted by the Assistant U.S. Attorney handling the tax issues to work on the obscenity part of the case. In 1996, the corporation entered a guilty plea and was sentenced to a fine of $250,000 for the obscenity conviction.

6. United States v. Manson (N.D.FL.). On October 18, 1995, Manson, who operated a bulletin board system known as Titan BBS, was indicted on two counts of using and causing to be used a combined computer and telephone systems facility for the purpose of transporting obscene material in interstate commerce and forfeiture. Manson pled guilty to all charges and was sentenced to one year and one day incarceration.

7. United States v. Hicks (N.D.FL.). During the above referenced investigation, investigators learned of another BBS offering adult pornography and non-adult services. This case was prosecuted by the United States Attorney's office for the Northern District of Florida. The defendant was charged in 1995 with four counts of using and causing to be used a combined computer and telephone system facility of interstate commerce for the purpose of transporting obscene material and one count of forfeiture. He pled guilty to all counts and received a sentence of 15 months incarceration.

8. United States v. Mary Jane Jenkins et al. (S.D.TX.). Jenkins and several other defendants were originally indicted in 1991 for distribution of obscene material and RICO in the Southern District of Texas. During the pendency of the case, two of the attorneys representing Jenkins and her associations were indicted for perjury and convicted. In 1995 all but one defendant entered guilty pleas to one count of interstate transportation of obscene material and Jenkins, as an officer of the subject corporation, entered a plea, forfeited $500,000 of proceeds and closed the stores that the corporation operated in Texas. Each of the defendants received three-year terms of probation.

9. United States v. Thomas and Amateur Action (W.D.TN.). Robert and Carleen Thomas were convicted by a jury of using phone lines and computer modems to traffic in obscene photographs over their computer bulletin board system (Amateur Action BBS) and of transporting obscene videos by common carrier. They received sentences of 37 and 30 months respectively. Their convictions were upheld on appeal.

10. United States v. Murphy (S.D.Iowa). During an investigation by the IRS, agents found 900 disks and videos during the execution of a search warrant that contained obscenity and child pornography. The 1997 indictment alleged that Murphy was engaged in the business of selling and distributing videotapes containing sexually explicit material. He also allegedly advertised his business through the Internet by posting messages on electronic bulletin board systems. In February, 1998, Murphy pled guilty to possession of child pornography, using a facility of interstate commerce to sell and distribute obscene matter, and fraudulent use of a credit card. Because he provided assistance to the prosecutors, he was sentenced to 51 months incarceration, a downward departure.

11. United States v. Mark Carriere (W.D.KY.). Both Carriere and his corporation, Multi-Media Distributing Co., Inc. pled guilty to a 1994 indictment charging distribution of obscenity. Carriere received five years probation and a fine was paid.

12. United States v. New Technology, et al. (S.D.TX). Two businesses and two individuals were indicted in 2001 on one count of mailing obscene video tapes and one count of selling or distributing obscene video tapes. The case is scheduled for trial in Houston in the spring of 2001.

In regard to your questions concerning prosecutions of the recordkeeping statute, 18 U.S.C. § 2257, our statistics also show that five cases were charged under 18 U.S.C. § 2257 from Fiscal Year 1993 through Fiscal Year 2000. Five cases were resolved, all by guilty pleas. We understand that the FBI does not regularly conduct inspections pursuant to 18 U.S.C. § 2257, but would inspect records upon the receipt of a complaint concerning a violation.

We hope that you will find this information helpful to you. Please contact me if we can be of further assistance to you.

Sincerely,

Sheryl L. Walter
Acting Assistant Attorney General

Enclosures

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

Mr. DELAHUNT. Welcome, General. An individual by the name of Emanuel Constant headed a paramilitary group in Haiti called FRAP in the early nineties. That group clearly was involved in numerous massacres and killings of civilians, with the approval of the military government then in power. He has come—he later came to the United States where he still resides. And I don't know if you're familiar with this particular case, but he has been described as a gross violator of human rights. Last year, a Haitian court found him guilty of a particular massacre and Haiti has requested his extradition. And according to news reports, the INS was ready to deport him. However, because of government intervention, he still is free here in the United States. Apparently he was a CIA asset.

Are you familiar with this case and if you are could you clarify what the situation is for us?

Attorney General ASHCROFT. I am not familiar with this case.

Mr. DELAHUNT. Fine. I'd like to at some point in time if you or a deputy could have a discussion with me on it, I and I know other Members in Congress have a profound interest in this matter.

Attorney General ASHCROFT. Well, may I just comment that extradition is very important. It's important to the United States. We're seeking to extradite people all the time. We need other Nations to cooperate with us and it seems to me that the last thing we would want to become is a refuge for people who had violated the rights of others in a barbaric way and——

Mr. DELAHUNT. I respect that sentiment, Mr. Attorney General, and I also concur with your opening statement about public confidence in the integrity of the justice system is essential, and I am sure you're aware, and much discussion today has focused on the application of the death penalty in terms of the Federal judicial system. Well, even the Supreme Court has indicated that there is a Federal constitutional interest in the application of the death penalty in State courts, and I would suggest that we have a real crisis in confidence of the implementation of the death penalty in State courts.

There have been recent studies; for example, there's a Columbia University study that indicates that 70 percent of the death penalty cases in the State courts contain serious reversible error. A good conservative Republican from Illinois, Governor Ryan, because of what has occurred in Illinois, did impose a moratorium until he could thoroughly sort out what occurred in his particular jurisdiction.

Myself and Representative LaHood and about 200 Members of Congress, and I would suggest that this is a bipartisan effort, have filed legislation which we feel would address this particular unacceptable situation and it's called the Innocence Protection Act. I don't know whether you've had an opportunity to review it, but what it does do is that it mandates DNA testing in certain cases and, more importantly, incentivizes the States to provide adequate legal services to defendants. I would welcome a comment if you have any.

Attorney General ASHCROFT. Well, first of all, I commend you for caring about the accuracy of the judicial system. I don't think there's anyone who will thoughtfully say that we shouldn't elevate

the accuracy and integrity of the conclusions we reach. And I'm interested in trying to provide the leadership and capacity to do that across the system and I commend those in the Congress who seek those objectives without commenting on the specifics of their legislation.

Mr. DELAHUNT. I would like to work with you, and I know I speak for other Members, with you in terms of drafting this legislation because I really think it's important if the American people are going to continue to have confidence in our justice system.

Chairman SENSENBRENNER. The gentleman from Alabama, Mr. Bachus.

Mr. BACHUS. Thank you, Mr. Chairman. Thank you, Attorney General Ashcroft. First, I want to join with several other Members who have complimented you on the breakfasts you've held, inviting Members of both parties to sit down together with you and have a dialogue, and I think that is very helpful and something I find refreshing. The University of California Berkeley uses SAT scores in their admissions process. Fire Departments use physical strength tests, minimum physical strength tests, to choose firefighters because those firefighters must carry people from burning buildings. States like New Jersey have approved a site for a cement plant which happened to be in a minority community. New York City wanted to increase their fares in their subway system and their bus system. NCAA has established certain academic requirements for their athletes.

All those practices or procedures have been attacked in court, not because they discriminate or there was any intent to discriminate, but because they had a disparate impact or disproportional impact on a certain class of citizens. There's been a recent decision I know you're aware of in the Supreme Court, the *Sandoval* decision, about disparate impact, in which that question was addressed, and my question to you is this: First of all, are you familiar with Attorney General Reno's order of July 14, 1994, dealing with disparate impact?

Attorney General ASHCROFT. I cannot say that I am.

Mr. BACHUS. Okay. In that memorandum she asked all heads of departments and agencies to provide Federal financial assistance to ensure that the disparate impact provisions are fully utilized, and she went on to say where Federal funding programs have disproportionate effects those policies and practices must be eliminated unless they're shown to be necessary to the program's operation and there is no less discriminatory alternative.

The problem with that directive, as I see it now, is that it flies in the face of the Supreme Court's decision in the *Sandoval* case. So my question to you is, what will the Justice Department—in light of the *Sandoval* decision what will be you all's position on disparate impact cases?

Attorney General ASHCROFT. Well, Congressman, I have to tell you that I'll have to look at the policy as expressed in the memo, did you say June 14 of——

Mr. BACHUS. Of 1994.

Attorney General ASHCROFT [continuing]. Of 1994 and review it in conjunction with the Supreme Court's decision. I wish I were conversant enough with both of those settings and I had the ability

to detail for you the approach that I would take, but I would like to do that in a considered and measured fashion and get back to you.

Mr. BACHUS. Sure, I appreciate that. I have no further questions. If you would like to comment and if you wish to do it in a more reasoned, considered manner at a later time I would respect that, but would you comment on the *Sandoval* decision?

Attorney General ASHCROFT. I think rather than take a running leap at that here without having a recent assessment of it, it would be better for me to restrain myself.

[The information referred to follows:]

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ALEXANDER, DIRECTOR, ALABAMA DEPARTMENT OF PUBLIC SAFETY, ET AL. *v.* SANDOVAL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99–1908. Argued January 16, 2001—Decided April 24, 2001

As a recipient of federal financial assistance, the Alabama Department of Public Safety (Department), of which petitioner Alexander is the Director, is subject to Title VI of the Civil Rights Act of 1964. Section 601 of that Title prohibits discrimination based on race, color, or national origin in covered programs and activities. Section 602 authorizes federal agencies to effectuate §601 by issuing regulations, and the Department of Justice (DOJ) in an exercise of this authority promulgated a regulation forbidding funding recipients to utilize criteria or administrative methods having the effect of subjecting individuals to discrimination based on the prohibited grounds. Respondent Sandoval brought this class action to enjoin the Department's decision to administer state driver's license examinations only in English, arguing that it violated the DOJ regulation because it had the effect of subjecting non-English speakers to discrimination based on their national origin. Agreeing, the District Court enjoined the policy and ordered the Department to accommodate non-English speakers. The Eleventh Circuit affirmed. Both courts rejected petitioners' argument that Title VI did not provide respondents a cause of action to enforce the regulation.

Held: There is no private right of action to enforce disparate-impact regulations promulgated under Title VI. Pp. 3–17.

(a) Three aspects of Title VI must be taken as given. First, private individuals may sue to enforce §601. See, *e.g.*, *Cannon* v. *University of Chicago*, 441 U. S. 677, 694, 696, 699, 703, 710–711. Second, §601

Syllabus

prohibits only intentional discrimination. See, *e.g., Alexander* v. *Choate,* 469 U. S. 287, 293. Third, it must be assumed for purposes of deciding this case that regulations promulgated under §602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under §601. Pp. 3–5.

(b) This Court has not, however, held that Title VI disparate-impact regulations may be enforced through a private right of action. *Cannon* was decided on the assumption that the respondent there had intentionally discriminated against the petitioner, see 441 U. S., at 680. In *Guardians Assn.* v. *Civil Serv. Comm'n of New York City,* 463 U. S. 582, the Court *held* that private individuals could not recover compensatory damages under Title VI except for intentional discrimination. Of the five Justices who also voted to uphold disparate-impact regulations, three expressly reserved the question of a direct private right of action to enforce them, 463 U. S., at 645, n. 18. Pp. 5–7.

(c) Nor does it follow from the three points taken as given that Congress must have intended such a private right of action. There is no doubt that regulations applying §601's ban on intentional discrimination are covered by the cause of action to enforce that section. But the disparate-impact regulations do not simply apply §601—since they forbid conduct that §601 permits—and thus the private right of action to enforce §601 does not include a private right to enforce these regulations. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.,* 511 U. S. 164, 173. That right must come, if at all, from the independent force of §602. Pp. 7–10.

(d) Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. *Touche Ross & Co.* v. *Redington,* 442 U. S. 560, 578. This Court will not revert to the understanding of private causes of action, represented by *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 433, that held sway when Title VI was enacted. That understanding was abandoned in *Cort* v. *Ash,* 422 U. S. 66, 78. Nor does the Court agree with the Government's contention that cases interpreting statutes enacted prior to *Cort* v. *Ash* have given dispositive weight to the expectations that the enacting Congress had formed in light of the contemporary legal context. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* 456 U. S. 353, 378–379; *Cannon, supra,* at 698–699; and *Thompson* v. *Thompson,* 484 U. S. 174, distinguished. Pp. 10–12.

(e) The search for Congress's intent in this case begins and ends with Title VI's text and structure. The "rights-creating" language so critical to *Cannon*'s §601 analysis, 441 U. S., at 690, n. 13, is completely absent from §602. Whereas §601 decrees that "[n]o person . . . shall . . . be subjected to discrimination," §602 limits federal agencies to "effec-

Syllabus

tuat[ing]" rights created by §601. And §602 focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the regulating agencies. Hence, there is far less reason to infer a private remedy in favor of individual persons, *Cannon, supra,* at 690–691. The methods §602 expressly provides for enforcing its regulations, which place elaborate restrictions on agency enforcement, also suggest a congressional intent not to create a private remedy through §602. See, *e.g., Karahalios* v. *Federal Employees,* 489 U. S. 527, 533. Pp. 12–15.

(f) The Court rejects arguments that the regulations at issue contain rights-creating language and so must be privately enforceable; that amendments to Title VI in §1003 of the Rehabilitation Act Amendments of 1986 and §6 of the Civil Rights Restoration Act of 1987 "ratified" decisions finding an implied private right of action to enforce the regulations; and that the congressional intent to create a right of action must be inferred under *Curran, supra,* at 353, 381–382. Pp. 15–17.

197 F. 3d 484, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 99–1908

JAMES ALEXANDER, DIRECTOR, ALABAMA DEPARTMENT OF PUBLIC SAFETY, ET AL., PETITIONERS *v.* MARTHA SANDOVAL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 24, 2001]

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964.

I

The Alabama Department of Public Safety (Department), of which petitioner James Alexander is the Director, accepted grants of financial assistance from the United States Department of Justice (DOJ) and Department of Transportation (DOT) and so subjected itself to the restrictions of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U. S. C. §2000d *et seq.* Section 601 of that Title provides that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI. 42 U. S. C. §2000d. Section 602 authorizes federal agencies "to effectuate the provisions of [§601] . . . by issuing rules, regulations, or orders of general applica-

bility," 42 U. S. C. §2000d–1, and the DOJ in an exercise of this authority promulgated a regulation forbidding funding recipients to "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ." 28 CFR §42.104(b)(2) (1999). See also 49 CFR §21.5(b)(2) (2000) (similar DOT regulation).

The State of Alabama amended its Constitution in 1990 to declare English "the official language of the state of Alabama." Amdt. 509. Pursuant to this provision and, petitioners have argued, to advance public safety, the Department decided to administer state driver's license examinations only in English. Respondent Sandoval, as representative of a class, brought suit in the United States District Court for the Middle District of Alabama to enjoin the English-only policy, arguing that it violated the DOJ regulation because it had the effect of subjecting non-English speakers to discrimination based on their national origin. The District Court agreed. It enjoined the policy and ordered the Department to accommodate non-English speakers. *Sandoval* v. *Hagan,* 7 F. Supp. 2d 1234 (1998). Petitioners appealed to the Court of Appeals for the Eleventh Circuit, which affirmed. *Sandoval* v. *Hagan,* 197 F. 3d 484 (1999). Both courts rejected petitioners' argument that Title VI did not provide respondents a cause of action to enforce the regulation.

We do not inquire here whether the DOJ regulation was authorized by §602, or whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin. The petition for writ of certiorari raised, and we agreed to review, only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation. 530 U. S. 1305 (2000).

II

Although Title VI has often come to this Court, it is fair to say (indeed, perhaps an understatement) that our opinions have not eliminated all uncertainty regarding its commands. For purposes of the present case, however, it is clear from our decisions, from Congress's amendments of Title VI, and from the parties' concessions that three aspects of Title VI must be taken as given. First, private individuals may sue to enforce §601 of Title VI and obtain both injunctive relief and damages. In *Cannon* v. *University of Chicago,* 441 U. S. 677 (1979), the Court held that a private right of action existed to enforce Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U. S. C. §1681 *et seq.* The reasoning of that decision embraced the existence of a private right to enforce Title VI as well. "Title IX," the Court noted, "was patterned after Title VI of the Civil Rights Act of 1964." 441 U. S., at 694. And, "[i]n 1972 when Title IX was enacted, the [parallel] language in Title VI had already been construed as creating a private remedy." *Id.,* at 696. That meant, the Court reasoned, that Congress had intended Title IX, like Title VI, to provide a private cause of action. *Id.,* at 699, 703, 710–711. Congress has since ratified *Cannon*'s holding. Section 1003 of the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U. S. C. §2000d–7, expressly abrogated States' sovereign immunity against suits brought in federal court to enforce Title VI and provided that in a suit against a State "remedies (including remedies both at law and in equity) are available . . . to the same extent as such remedies are available . . . in the suit against any public or private entity other than a State," §2000d–7(a)(2). We recognized in *Franklin* v. *Gwinnett County Public Schools,* 503 U. S. 60 (1992), that §2000d–7 "cannot be read except as a validation of *Cannon*'s holding." *Id.,* at 72; see also *id.,* at 78 (SCALIA, J., concurring in judgment) (same). It is thus beyond dispute

that private individuals may sue to enforce §601.

Second, it is similarly beyond dispute—and no party disagrees—that §601 prohibits only intentional discrimination. In *Regents of Univ. of Cal.* v. *Bakke,* 438 U. S. 265 (1978), the Court reviewed a decision of the California Supreme Court that had enjoined the University of California Medical School from "according any consideration to race in its admissions process." *Id.,* at 272. Essential to the Court's holding reversing that aspect of the California court's decision was the determination that §601 "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.,* at 287 (opinion of Powell, J.); see also *id.,* at 325, 328, 352 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). In *Guardians Assn.* v. *Civil Serv. Comm'n of New York City,* 463 U. S. 582 (1983), the Court made clear that under *Bakke* only intentional discrimination was forbidden by §601. 463 U. S., at 610–611 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., concurring in judgment); *id.,* at 612 (O'CONNOR, J., concurring in judgment); *id.,* at 642 (STEVENS, J., joined by Brennan and Blackmun, JJ., dissenting). What we said in *Alexander* v. *Choate,* 469 U. S. 287, 293 (1985), is true today: "Title VI itself directly reach[es] only instances of intentional discrimination."[1]

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[1] Since the parties do not dispute this point, it is puzzling to see JUSTICE STEVENS go out of his way to disparage the decisions in *Regents of Univ. of Cal.* v. *Bakke,* 438 U. S. 265 (1978), and *Guardians Assn.* v. *Civil Serv. Comm'n of New York City,* 463 U. S. 582 (1983), as "somewhat haphazard," *post,* at 16, particularly since he had already accorded *stare decisis* effect to the former 18 years ago, see *Guardians,* 463 U. S., at 639–642 (dissenting opinion), and since he participated in creating the latter, see *ibid.* Nor does JUSTICE STEVENS' reliance on *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837 (1984), see *post,* at 17–18, explain his aboutface, since he expressly reaffirms, see *post,* at 17–18, n. 18, the settled principle that decisions of this Court declaring the meaning of statutes prior to *Chevron* need not be reconsid-

Third, we must assume for purposes of deciding this case that regulations promulgated under §602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under §601. Though no opinion of this Court has held that, five Justices in *Guardians* voiced that view of the law at least as alternative grounds for their decisions, see 463 U. S., at 591–592 (opinion of White, J.); *id.*, at 623, n. 15 (Marshall, J., dissenting); *id.*, at 643–645 (STEVENS, J., joined by Brennan and Blackmun, JJ., dissenting), and dictum in *Alexander* v. *Choate* is to the same effect, see 469 U. S., at 293, 295, n. 11. These statements are in considerable tension with the rule of *Bakke* and *Guardians* that §601 forbids only intentional discrimination, see, *e.g.*, *Guardians Assn.* v. *Civil Serv. Comm'n of New York City, supra,* at 612–613 (O'CONNOR, J., concurring in judgment), but petitioners have not challenged the regulations here. We therefore assume for the purposes of deciding this case that the DOJ and DOT regulations proscribing activities that have a disparate impact on the basis of race are valid.

Respondents assert that the issue in this case, like the first two described above, has been resolved by our cases. To reject a private cause of action to enforce the disparate-impact regulations, they say, we would "[have] to ignore the actual language of *Guardians* and *Cannon*." Brief for Respondents 13. The language in *Cannon* to which respondents refer does not in fact support their position, as

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ered after *Chevron* in light of agency regulations that were already in force when our decisions were issued, *Lechmere, Inc.* v. *NLRB,* 502 U. S. 527, 536–537 (1992); *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.,* 497 U. S. 116, 131 (1990); see also *Sullivan* v. *Everhart,* 494 U. S. 83, 103–104, n. 6 (1990) (STEVENS, J., dissenting) ("It is, of course, of no importance that [an opinion] predates *Chevron* .... As we made clear in *Chevron,* the interpretive maxims summarized therein were 'well-settled principles'").

we shall discuss at length below, see *infra*, at 12–13. But in any event, this Court is bound by holdings, not language. *Cannon* was decided on the assumption that the University of Chicago had intentionally discriminated against petitioner. See 441 U. S., at 680 (noting that respondents "admitted *arguendo*" that petitioner's "application for admission to medical school was denied by the respondents because she is a woman"). It therefore *held* that Title IX created a private right of action to enforce its ban on intentional discrimination, but had no occasion to consider whether the right reached regulations barring disparate-impact discrimination.[2] In *Guardians*, the Court *held* that private individuals could not recover compensatory damages under Title VI except for intentional discrimination. Five Justices in addition voted to uphold the disparate-impact regulations (four would have declared them invalid, see 463 U. S., at 611, n. 5 (Powell, J., concurring in judgment); *id.*, at 612–614 (O'CONNOR, J., concurring in

[2] Although the dissent acknowledges that "the breadth of [*Cannon*'s] precedent is a matter upon which reasonable jurists may differ," *post*, at 21, it disagrees with our reading of *Cannon*'s holding because it thinks the distinction we draw between disparate-impact and intentional discrimination was "wholly foreign" to that opinion, see *post*, at 5. *Cannon*, however, was decided less than one year after the Court in *Bakke* had drawn precisely that distinction *with respect to Title VI*, see *supra*, at 4, and it is absurd to think that *Cannon* meant, without discussion, to ban under Title IX the very disparate-impact discrimination that *Bakke* said Title VI permitted. The *only* discussion in *Cannon* of Title IX's scope is found in Justice Powell's dissenting opinion, which simply assumed that the conclusion that Title IX would be limited to intentional discrimination was "forgone in light of our holding" in *Bakke*. *Cannon* v. *University of Chicago*, 441 U. S. 677, 748, n. 19 (1979). The dissent's additional claim that *Cannon* provided a private right of action for "all the discrimination prohibited by the *regulatory scheme* contained in Title IX," *post*, at 5, n. 4 (emphasis added), simply begs the question at the heart of this case, which is whether a right of action to enforce disparate-impact regulations must be independently identified, see *infra*, at 7–10.

judgment)), but of those five, three expressly reserved the question of a direct private right of action to enforce the regulations, saying that "[w]hether a cause of action against private parties exists directly under the regulations . . . [is a] questio[n] that [is] not presented by this case." *Id.*, at 645, n. 18 (STEVENS, J., dissenting).[3] Thus, only two Justices had cause to reach the issue that respondents say the "actual language" of *Guardians* resolves. Neither that case,[4] nor any other in this Court, has held that the private right of action exists.

Nor does it follow straightaway from the three points we have taken as given that Congress must have intended a private right of action to enforce disparate-impact regulations. We do not doubt that regulations applying §601's ban on intentional discrimination are covered by the cause of action to enforce that section. Such regulations, if valid and reasonable, authoritatively construe the statute itself, see *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 257 (1995); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984), and it is therefore meaningless to talk

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[3] We of course accept the statement by the author of the dissent that he "thought" at the time of *Guardians* that disparate-impact regulations could be enforced "in an implied action against private parties," *post,* at 9, n. 6. But we have the better interpretation of what our colleague *wrote* in *Guardians*. In the closing section of his opinion, JUSTICE STEVENS concluded that because respondents in that case had "violated the petitioners' rights under [the] regulations . . . [t]he petitioners were therefore entitled to the compensation they sought under 42 U. S. C. §1983 and were awarded by the District Court." 463 U. S., at 645. The passage omits any mention of a direct private right of action to enforce the regulations, and the footnote we have quoted in text—which appears immediately after this concluding sentence, see *id.*, at 645, n. 18—makes clear that the omission was not accidental.

[4] Ultimately, the dissent agrees that "the holding in *Guardians* does not compel the conclusion that a private right of action exists to enforce the Title VI regulations against private parties . . . ." *Post,* at 9.

about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well. The many cases that respondents say have "assumed" that a cause of action to enforce a statute includes one to enforce its regulations illustrate (to the extent that cases in which an issue was not presented can illustrate anything) only this point; each involved regulations of the type we have just described, as respondents conceded at oral argument, Tr. of Oral Arg. 33. See *National Collegiate Athletic Assn.* v. *Smith,* 525 U. S. 459, 468 (1999) (regulation defining who is a "recipient" under Title IX); *School Bd. of Nassau Cty.* v. *Arline,* 480 U. S. 273, 279–281 (1987) (regulations defining the terms "physical impairment" and "major life activities" in §504 of the Rehabilitation Act of 1973); *Bazemore* v. *Friday,* 478 U. S. 385, 408–409 (1986) (White, J., joined by four other Justices, concurring) (regulation interpreting Title VI to require "affirmative action" remedying effects of intentional discrimination); *Alexander* v. *Choate,* 469 U. S., at 299, 309 (regulations clarifying what sorts of disparate impacts upon the handicapped were covered by §504 of the Rehabilitation Act of 1973, which the Court assumed included some such impacts). Our decision in *Lau* v. *Nichols,* 414 U. S. 563 (1974), falls within the same category. The Title VI regulations at issue in *Lau,* similar to the ones at issue here, forbade funding recipients to take actions which had the effect of discriminating on the basis of race, color, or national origin. *Id.,* at 568. Unlike our later cases, however, the Court in *Lau* interpreted §601 itself to proscribe disparate-impact discrimination, saying that it "rel[ied] solely on §601 . . . to reverse the Court of Appeals," *id.,* at 566, and that the disparate-impact regulations simply "[made] sure that recipients of federal aid . . . conduct[ed] any federally financed projects consis-

tently with §601," *id.*, at 567.[5]

We must face now the question avoided by *Lau*, because we have since rejected *Lau*'s interpretation of §601 as reaching beyond intentional discrimination. See *supra*, at 4. It is clear now that the disparate-impact regulations do not simply apply §601—since they indeed forbid conduct that §601 permits—and therefore clear that the private right of action to enforce §601 does not include a private right to enforce these regulations. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 173 (1994) (a "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute]"). That right must come, if at all, from the independent force of §602. As stated earlier, we assume for purposes of this decision that §602 confers the authority to promulgate disparate-impact regulations[6]; the question remains whether it

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[5] It is true, as the dissent points out, see *post*, at 3–4, that three Justices who concurred in the result in *Lau* relied on regulations promulgated under §602 to support their position, see *Lau* v. *Nichols*, 414 U. S. 563, 570–571 (1974) (Stewart, J., concurring in result). But the five Justices who made up the majority did not, and their holding is not made coextensive with the concurrence because their opinion does not expressly preclude (is "consistent with," see *post*, at 4) the concurrence's approach. The Court would be in an odd predicament if a concurring minority of the Justices could force the majority to address a point they found it unnecessary (and did not wish) to address, under compulsion of JUSTICE STEVENS' new principle that silence implies agreement.

[6] For this reason, the dissent's extended discussion of the scope of agencies' regulatory authority under §602, see *post*, at 13–15, is beside the point. We cannot help observing, however, how strange it is to say that disparate-impact regulations are "inspired by, at the service of, and inseparably intertwined with" §601, *post*, at 15, when §601 permits the very behavior that the regulations forbid. See *Guardians*, 463 U. S., at 613 (O'CONNOR, J., concurring in judgment) ("If, as five members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe *only* purposeful discrimination . . . , regulations that would proscribe conduct by the recipient having only a discriminatory *effect* . . . do not simply

confers a private right of action to enforce them. If not, we must conclude that a failure to comply with regulations promulgated under §602 that is not also a failure to comply with §601 is not actionable.

Implicit in our discussion thus far has been a particular understanding of the genesis of private causes of action. Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. *Touche Ross & Co.* v. *Redington,* 442 U. S. 560, 578 (1979) (remedies available are those "that Congress enacted into law"). The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11, 15 (1979). Statutory intent on this latter point is determinative. See, *e.g., Virginia Bankshares, Inc.* v. *Sandberg,* 501 U. S. 1083, 1102 (1991); *Merrell Dow Pharmaceuticals Inc.* v. *Thompson,* 478 U. S. 804, 812, n. 9 (1986) (collecting cases). Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. See, *e.g., Massachusetts Mut. Life Ins. Co.* v. *Russell,* 473 U. S. 134, 145, 148 (1985); *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* at 23; *Touche Ross & Co.* v. *Redington, supra,* at 575–576. "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson,* 501 U. S. 350, 365 (1991) (SCALIA, J., concurring in part and concurring in judgment).

Respondents would have us revert in this case to the understanding of private causes of action that held sway

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'further' the purpose of Title VI; they go well *beyond* that purpose").

40 years ago when Title VI was enacted. That understanding is captured by the Court's statement in *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 433 (1964), that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute. We abandoned that understanding in *Cort* v. *Ash,* 422 U. S. 66, 78 (1975)—which itself interpreted a statute enacted under the *ancien regime*—and have not returned to it since. Not even when interpreting the same Securities Exchange Act of 1934 that was at issue in *Borak* have we applied *Borak*'s method for discerning and defining causes of action. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A., supra,* at 188; *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau,* 508 U. S. 286, 291–293 (1993); *Virginia Bankshares, Inc.* v. *Sandberg, supra,* at 1102–1103; *Touche Ross & Co.* v. *Redington, supra,* at 576–578. Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.

Nor do we agree with the Government that our cases interpreting statutes enacted prior to *Cort* v. *Ash* have given "dispositive weight" to the "expectations" that the enacting Congress had formed "in light of the 'contemporary legal context.'" Brief for United States 14. Only three of our legion implied-right-of-action cases have found this sort of "contemporary legal context" relevant, and two of those involved Congress's enactment (or reenactment) of the verbatim statutory text that courts had previously interpreted to create a private right of action. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* 456 U. S. 353, 378–379 (1982); *Cannon* v. *University of Chicago,* 441 U. S., at 698–699. In the third case, this sort of "contemporary legal context" simply buttressed a conclusion independently supported by the text of the statute. See *Thompson* v. *Thompson,* 484 U. S. 174 (1988). We have never accorded dispositive weight to context shorn of

text. In determining whether statutes create private rights of action, as in interpreting statutes generally, see *Blatchford* v. *Native Village of Noatak,* 501 U. S. 775, 784 (1991), legal context matters only to the extent it clarifies text.

We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI.[7] Section 602 authorizes federal agencies "to effectuate the provisions of [§601] . . . by issuing rules, regulations, or orders of general applicability." 42 U. S. C. §2000d–1. It is immediately clear that the "rights-creating" language so critical to the Court's analysis in *Cannon* of §601, see 441 U. S., at 690 n. 13, is completely absent from §602. Whereas §601 decrees that "[n]o person . . . shall . . . be subjected to discrimination," 42 U. S. C. §2000d, the text of §602 provides that "[e]ach Federal department and agency . . . is authorized and directed to effectuate the provisions of [§601]," 42 U. S. C. §2000d–1. Far from displaying congressional intent to create new rights, §602 limits agencies to "effectuat[ing]" rights already created by §601. And the focus of §602 is twice removed from the individuals who will ultimately benefit from Title VI's protection. Statutes that focus on the person regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons." *California* v. *Sierra Club,* 451 U. S. 287, 294 (1981). Section 602 is yet a step further removed: it focuses

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[7]Although the dissent claims that we "adop[t] a methodology that blinds itself to important evidence of congressional intent," see *post,* at 21, our methodology is not novel, but well established in earlier decisions (including one authored by JUSTICE STEVENS, see *Northwest Airlines, Inc.* v. *Transport Workers,* 451 U. S. 77, 94, n. 31 (1981)), which explain that the interpretive inquiry begins with the text and structure of the statute, see *id.,* at 91, and ends once it has become clear that Congress did not provide a cause of action.

neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating. Like the statute found not to create a right of action in *Universities Research Assn., Inc.* v. *Coutu,* 450 U. S. 754 (1981), §602 is "phrased as a directive to federal agencies engaged in the distribution of public funds," *id.,* at 772. When this is true, "[t]here [is] far less reason to infer a private remedy in favor of individual persons," *Cannon* v. *University of Chicago, supra,* at 690–691. So far as we can tell, this authorizing portion of §602 reveals no congressional intent to create a private right of action.

Nor do the methods that §602 goes on to provide for enforcing its authorized regulations manifest an intent to create a private remedy; if anything, they suggest the opposite. Section 602 empowers agencies to enforce their regulations either by terminating funding to the "particular program, or part thereof," that has violated the regulation or "by any other means authorized by law," 42 U. S. C. §2000d–1. No enforcement action may be taken, however, "until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." *Ibid.* And every agency enforcement action is subject to judicial review. §2000d–2. If an agency attempts to terminate program funding, still more restrictions apply. The agency head must "file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action." §2000d–1. And the termination of funding does not "become effective until thirty days have elapsed after the filing of such report." *Ibid.* Whatever these elaborate restrictions on agency enforcement may imply for the private enforcement of rights created *outside* of §602, compare *Cannon* v. *University of Chicago, supra,* at 706, n. 41, 712, n. 49;

Regents of Univ. of Cal. v. *Bakke,* 438 U. S., at 419, n. 26 (STEVENS, J., concurring in judgment in part and dissenting in part), with *Guardians Assn.* v. *Civil Serv. Comm'n of New York City,* 463 U. S., at 609–610 (Powell, J., concurring in judgment); *Regents of Univ. of Cal.* v. *Bakke, supra,* at 382–383 (opinion of White, J.), they tend to contradict a congressional intent to create privately enforceable rights through §602 itself. The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others. See, *e.g., Karahalios* v. *Federal Employees,* 489 U. S. 527, 533 (1989); *Northwest Airlines, Inc.* v. *Transport Workers,* 451 U. S. 77, 93–94 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S., at 19–20. Sometimes the suggestion is so strong that it precludes a finding of congressional intent to create a private right of action, even though other aspects of the statute (such as language making the would-be plaintiff "a member of the class for whose benefit the statute was enacted") suggest the contrary. *Massachusetts Mut. Life Ins. Co.* v. *Russell,* 473 U. S., at 145; see *id.,* at 146–147. And as our Rev. Stat. §1979, 42 U. S. C. §1983 cases show, some remedial schemes foreclose a private cause of action to enforce even those statutes that admittedly create substantive private rights. See, *e.g., Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.,* 453 U. S. 1, 19–20 (1981). In the present case, the claim of exclusivity for the express remedial scheme does not even have to overcome such obstacles. The question whether §602's remedial scheme can overbear other evidence of congressional intent is simply not presented, since we have found no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under §602.

Both the Government and respondents argue that the *regulations* contain rights-creating language and so must

be privately enforceable, see Brief for United States 19–20; Brief for Respondents 31, but that argument skips an analytical step. Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. *Touche Ross & Co.* v. *Redington,* 442 U. S., at 577, n. 18 ("[T]he language of the statute and not the rules must control"). Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

The last string to respondents' and the Government's bow is their argument that two amendments to Title VI "ratified" this Court's decisions finding an implied private right of action to enforce the disparate-impact regulations. See Rehabilitation Act Amendments of 1986, §1003, 42 U. S. C. §2000d–7; Civil Rights Restoration Act of 1987, §6, 102 Stat. 31, 42 U. S. C. §2000d–4a. One problem with this argument is that, as explained above, none of our decisions establishes (or even assumes) the private right of action at issue here, see *supra,* at 5–8, which is why in *Guardians* three Justices were able expressly to reserve the question. See 463 U. S., at 645, n. 18 (STEVENS, J., dissenting). Incorporating our cases in the amendments would thus not help respondents. Another problem is that the incorporation claim itself is flawed. Section 1003 of the Rehabilitation Act Amendments of 1986, on which only respondents rely, by its terms applies only to suits "for a violation of a *statute*," 42 U. S. C. §2000d–7(a)(2) (emphasis added). It therefore does not speak to suits for violations of regulations that go beyond the statutory

proscription of §601. Section 6 of the Civil Rights Restoration Act of 1987 is even less on point. That provision amends Title VI to make the term "program or activity" cover larger portions of the institutions receiving federal financial aid than it had previously covered, see *Grove City College* v. *Bell,* 465 U. S. 555 (1984). It is impossible to understand what this has to do with implied causes of action—which is why we declared in *Franklin* v. *Gwinnett County Public Schools,* 503 U. S., at 73, that §6 did not "in any way alte[r] the existing rights of action and the corresponding remedies permissible under . . . Title VI." Respondents point to *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* 456 U. S., at 381–382, which inferred congressional intent to ratify lower court decisions regarding a particular statutory provision when Congress comprehensively revised the statutory scheme but did not amend that provision. But we recently criticized *Curran*'s reliance on congressional inaction, saying that "[a]s a general matter . . . [the] argumen[t] deserve[s] little weight in the interpretive process." *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.,* 511 U. S., at 187. And when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, we have spoken more bluntly: "It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." *Patterson* v. *McLean Credit Union,* 491 U. S. 164, 175, n. 1 (1989) (quoting *Johnson* v. *Transportation Agency, Santa Clara Cty.,* 480 U. S. 616, 671–672 (1987) (SCALIA, J., dissenting)).

Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under

§602.[8] We therefore hold that no such right of action exists. Since we reach this conclusion applying our standard test for discerning private causes of action, we do not address petitioners' additional argument that implied causes of action against States (and perhaps nonfederal state actors generally) are inconsistent with the clear statement rule of *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1 (1981). See *Davis* v. *Monroe County Bd. of Ed.,* 526 U. S. 629, 656–657, 684–685 (1999) (KENNEDY, J., dissenting).

The judgment of the Court of Appeals is reversed.

It is so ordered.

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[8]The dissent complains that we "offe[r] little affirmative support" for this conclusion. *Post,* at 24. But as JUSTICE STEVENS has previously recognized in an opinion for the Court, "affirmative" evidence of congressional intent must be provided *for* an implied remedy, not against it, for without such intent "the essential predicate for implication of a private remedy simply does not exist," *Northwest Airlines, Inc.,* 451 U. S., at 94. The dissent's assertion that "petitioners *have* marshaled substantial affirmative evidence that a private right of action exists to enforce Title VI *and the regulations validly promulgated thereunder*," *post,* at 24–25, n. 26 (second emphasis added), once again begs the question whether authorization of a private right of action to enforce a statute constitutes authorization of a private right of action to enforce regulations that go beyond what the statute itself requires.

SUPREME COURT OF THE UNITED STATES

No. 99–1908

JAMES ALEXANDER, DIRECTOR, ALABAMA DEPARTMENT OF PUBLIC SAFETY, ET AL., PETITIONERS
v. MARTHA SANDOVAL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 24, 2001]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

In 1964, as part of a groundbreaking and comprehensive civil rights Act, Congress prohibited recipients of federal funds from discriminating on the basis of race, ethnicity, or national origin. Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. §§2000d to 2000d–7. Pursuant to powers expressly delegated by that Act, the federal agencies and departments responsible for awarding and administering federal contracts immediately adopted regulations prohibiting federal contractees from adopting policies that have the "effect" of discriminating on those bases. At the time of the promulgation of these regulations, prevailing principles of statutory construction assumed that Congress intended a private right of action whenever such a cause of action was necessary to protect individual rights granted by valid federal law. Relying both on this presumption and on independent analysis of Title VI, this Court has repeatedly and consistently affirmed the right of private individuals to bring civil suits to enforce rights guaranteed by Title VI. A fair reading of those cases, and coherent implementation of the statutory scheme, requires the same result under Title VI's implementing regula-

tions.

In separate lawsuits spanning several decades, we have endorsed an action identical in substance to the one brought in this case, see *Lau* v. *Nichols,* 414 U. S. 563 (1974); demonstrated that Congress intended a private right of action to protect the rights guaranteed by Title VI, see *Cannon* v. *University of Chicago,* 441 U. S. 677 (1979); and concluded that private individuals may seek declaratory and injunctive relief against state officials for violations of regulations promulgated pursuant to Title VI, see *Guardians Assn.* v. *Civil Serv. Comm'n of New York City,* 463 U. S. 582 (1983). Giving fair import to our language and our holdings, every Court of Appeals to address the question has concluded that a private right of action exists to enforce the rights guaranteed both by the text of Title VI and by any regulations validly promulgated pursuant to that Title, and Congress has adopted several statutes that appear to ratify the status quo.

Today, in a decision unfounded in our precedent and hostile to decades of settled expectations, a majority of this Court carves out an important exception to the right of private action long recognized under Title VI. In so doing, the Court makes three distinct, albeit interrelated, errors. First, the Court provides a muddled account of both the reasoning and the breadth of our prior decisions endorsing a private right of action under Title VI, thereby obscuring the conflict between those opinions and today's decision. Second, the Court offers a flawed and unconvincing analysis of the relationship between §§601 and 602 of the Civil Rights Act of 1964, ignoring more plausible and persuasive explanations detailed in our prior opinions. Finally, the Court badly misconstrues the theoretical linchpin of our decision in *Cannon* v. *University of Chicago,* 441 U. S. 677 (1979), mistaking that decision's careful contextual analysis for judicial fiat.

I

The majority is undoubtedly correct that this Court has never said in so many words that a private right of action exists to enforce the disparate-impact regulations promulgated under §602. However, the failure of our cases to state this conclusion explicitly does not absolve the Court of the responsibility to canvass our prior opinions for guidance. Reviewing these opinions with the care they deserve, I reach the same conclusion as the Courts of Appeals: This Court has already considered the question presented today and concluded that a private right of action exists.[1]

When this Court faced an identical case 27 years ago, all the Justices believed that private parties could bring lawsuits under Title VI and its implementing regulations to enjoin the provision of governmental services in a manner that discriminated against non-English speakers. See *Lau* v. *Nichols,* 414 U. S. 563 (1974). While five Justices

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[1] Just about every Court of Appeals has either explicitly or implicitly held that a private right of action exists to enforce all of the regulations issued pursuant to Title VI, including the disparate-impact regulations. For decisions holding so most explicitly, see, *e.g. Powell* v. *Ridge*, 189 F. 3d 387, 400 (CA3 1999); *Chester Residents Concerned for Quality Living* v. *Seif*, 132 F. 3d 925, 936–937 (CA3 1997), summarily dism'd, 524 U. S. 974 (1998); *David K.* v. *Lane*, 839 F. 2d 1265, 1274 (CA7 1988); *Sandoval* v. *Hogan*, 197 F. 3d 484 (CA11 1999) (case below). See also *Latinos Unidos De Chelsea* v. *Secretary of Housing and Urban Development*, 799 F. 2d 774, 785, n. 20 (CA1 1986); *New York Urban League, Inc.* v. *New York*, 71 F. 3d 1031, 1036 (CA2 1995); *Ferguson* v. *Charleston*, 186 F. 3d 469 (CA4 1999), rev'd on other grounds, 532 U. S. __ (2001); *Castaneda* v. *Pickard*, 781 F. 2d 456, 465, n. 11 (CA5 1986); *Buchanan* v. *Bolivar*, 99 F. 3d 1352, 1356, n. 5 (CA6 1996); *Larry P.*. v. *Riles*, 793 F. 2d 969, 981–982 (CA9 1986); *Villanueva* v. *Carere*, 85 F. 3d 481, 486 (CA10 1996). No Court of Appeals has ever reached a contrary conclusion. But cf. *New York City Environmental Justice Alliance* v. *Giuliani*, 214 F. 3d 65, 72 (CA2 2000) (suggesting that the question may be open).

saw no need to go beyond the command of §601, Chief Justice Burger, Justice Stewart, and Justice Blackmun relied specifically and exclusively on the regulations to support the private action, see *id.*, at 569 (Stewart, J., concurring in result) (citing *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973); *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 280–281 (1969)). There is nothing in the majority's opinion in *Lau*, or in earlier opinions of the Court, that is not fully consistent with the analysis of the concurring Justices or that would have differentiated between private actions to enforce the text of §601 and private actions to enforce the regulations promulgated pursuant to §602. See *Guardians*, 463 U. S., at 591 (principal opinion of White, J.) (describing this history and noting that, up to that point, no Justice had ever expressed disagreement with Justice Stewart's analysis in *Lau*).[2]

Five years later, we more explicitly considered whether a private right of action exists to enforce the guarantees of Title VI and its gender-based twin, Title IX. See *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979). In that case, we examined the text of the statutes, analyzed the purpose of the laws, and canvassed the relevant legislative

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[2] Indeed, it would have been remarkable if the majority had offered any disagreement with the concurring analysis as the concurring Justices grounded their argument in well-established principles for determining the availability of remedies under regulations, principles that all but one Member of the Court had endorsed the previous Term. See *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973); *id.*, at 378 (Douglas, J., joined by Stewart and REHNQUIST, JJ., concurring in part and dissenting in part) (agreeing with the majority's analysis of the regulation in question); but see *id.*, at 383, n. 1 (Powell, J., dissenting) (reserving analysis of the regulation's validity). The other decision the concurring Justices cited for this well-established principle was unanimous and only five years old. See *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268 (1969).

history. Our conclusion was unequivocal: "We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination." *Id.*, at 703.

The majority acknowledges that *Cannon* is binding precedent with regard to both Title VI and Title IX, *ante*, at 3–4, but seeks to limit the scope of its holding to cases involving allegations of intentional discrimination. The distinction the majority attempts to impose is wholly foreign to *Cannon*'s text and reasoning. The opinion in *Cannon* consistently treats the question presented in that case as whether a private right of action exists to enforce "Title IX" (and by extension "Title VI"),[3] and does not draw any distinctions between the various types of discrimination outlawed by the operation of those statutes. Though the opinion did not reach out to affirmatively preclude the drawing of every conceivable distinction, it could hardly have been more clear as to the scope of its holding: A private right of action exists for "victims of *the* prohibited discrimination." 441 U. S., at 703 (emphasis added). Not some of the prohibited discrimination, but all of it.[4]

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[3] See *Cannon*, 441 U. S., at 687, 699, 702, n. 33, 703, 706, n. 40, 709.

[4] The majority is undoubtedly correct that *Cannon* was not a case about the substance of Title IX but rather about the remedies available under that statute. Therefore, *Cannon* can not stand as a precedent for the proposition either that Title IX and its implementing regulations reach intentional discrimination or that they do not do so. What *Cannon* did hold is that all the discrimination prohibited by the regulatory scheme contained in Title IX may be the subject of a private lawsuit. As the Court today concedes that *Cannon*'s holding applies to Title VI claims as well as Title IX claims, *ante*, at 3–4, and assumes that the regulations promulgated pursuant to §602 are validly promulgated antidiscrimination measures, *ante*, at 5, it is clear that today's opinion is in substantial tension with *Cannon*'s reasoning and holding.

Moreover, *Cannon* was itself a disparate-impact case. In that case, the plaintiff brought suit against two private universities challenging medical school admissions policies that set age limits for applicants. Plaintiff, a 39-year-old woman, alleged that these rules had the effect of discriminating against women because the incidence of interrupted higher education is higher among women than among men. In providing a shorthand description of her claim in the text of the opinion, we ambiguously stated that she had alleged that she was denied admission "because she is a woman," but we appended a lengthy footnote setting forth the details of her disparate-impact claim. Other than the shorthand description of her claim, there is not a word in the text of the opinion even suggesting that she had made the improbable allegation that the University of Chicago and Northwestern University had intentionally discriminated against women. In the context of the entire opinion (including both its analysis and its uncontested description of the facts of the case), that single ambiguous phrase provides no basis for limiting the case's holding to incidents of intentional discrimination. If anything, the fact that the phrase "because she is a woman" encompasses both intentional and disparate-impact claims should have made it clear that the reasoning in the opinion was equally applicable to both types of claims. In any event, the *holding* of the case certainly applied to the disparate-impact claim that was described in detail in footnote 1 of the opinion, *id.*, at 680.

Our fractured decision in *Guardians Assn.* v. *Civil Serv. Comm'n of New York City,* 463 U. S. 582 (1983), reinforces the conclusion that this issue is effectively settled. While the various opinions in that case took different views as to the spectrum of relief available to plaintiffs in Title VI cases, a clear majority of the Court expressly stated that private parties may seek injunctive relief against governmental practices that have the effect of discriminating

against racial and ethnic minorities. *Id.*, at 594–595, 607 (White, J.); *id.*, at 634 (Marshall, J., dissenting); *id.*, at 638 (STEVENS, J., joined by Brennan and Blackmun, JJ., dissenting). As this case involves just such an action, its result ought to follow naturally from *Guardians*.

As I read today's opinion, the majority declines to accord precedential value to *Guardians* because the five Justices in the majority were arguably divided over the mechanism through which private parties might seek such injunctive relief.[5] This argument inspires two responses. First, to the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U. S. C. §1983 in framing their Title VI claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference §1983 to obtain relief;

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[5]None of the relevant opinions was absolutely clear as to whether it envisioned such suits as being brought directly under the statute or under 42 U. S. C. §1983. However, a close reading of the opinions leaves little doubt that all of the Justices making up the *Guardians* majority contemplated the availability of private actions brought directly under the statute. Justice White fairly explicitly rested his conclusion on *Cannon*'s holding that an implied right of action exists to enforce the terms of both Title VI and Title IX. *Guardians*, 463 U. S., at 594–595. Given that fact and the added consideration that his opinion appears to have equally contemplated suits against private and public parties, it is clear that he envisioned the availability of injunctive relief directly under the statute. Justice Marshall's opinion never mentions §1983 and refers simply to "Title VI actions." *Id.*, at 625. In addition, his opinion can only be read as contemplating suits on equal terms against both public and private grantees, thus also suggesting that he assumed such suits could be brought directly under the statute. That leaves my opinion. Like Justice White, I made it quite clear that I believed the right to sue to enforce the disparate-impact regulations followed directly from *Cannon* and, hence, was built directly into the statute. 463 U. S., at 635–636, and n. 1. However, I did also note that, in the alternative, relief would be available in that particular case under §1983.

indeed, the plaintiffs in this case (or other similarly situated individuals) presumably retain the option of rechallenging Alabama's English-only policy in a complaint that invokes §1983 even after today's decision.

More important, the majority's reading of *Guardians* is strained even in reference to the broader question whether injunctive relief is available to remedy violations of the Title VI regulations by nongovernmental grantees. As *Guardians* involved an action against a governmental entity, making §1983 relief available, the Court might have discussed the availability of judicial relief without addressing the scope of the implied private right of action available directly under Title VI. See 463 U. S., at 638 (STEVENS, J.) ("Even if it were not settled by now that Title VI authorizes appropriate relief, both prospective and retroactive, to victims of racial discrimination at the hands of recipients of federal funds, the same result would follow in this case because the petitioners have sought relief under 42 U. S. C. §1983" (emphasis deleted)). However, the analysis in each of the relevant opinions did not do so.[6] Rather than focusing on considerations specific to

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[6]The Court today cites one sentence in my final footnote in *Guardians* that it suggests is to the contrary. *Ante*, at 7 (citing 463 U. S., at 645, n. 18). However, the Court misreads that sentence. In his opinion in *Guardians*, Justice Powell had stated that he would affirm the judgment for the reasons stated in his dissent in *Cannon*, see 463 U. S., at 609–610 (opinion concurring in judgment), and that he would also hold that private actions asserting violations of Title VI could not be brought under §1983, *id.*, at 610, and n. 3. One reason that he advanced in support of these conclusions was his view that the standard of proof in a §1983 action against public officials would differ from the standard in an action against private defendants. *Id.*, at 608, n. 1. In a footnote at the end of my opinion, *id.*, at 645, n. 18, I responded (perhaps inartfully) to Justice Powell. I noted that the fact that §1983 authorizes a lawsuit against the police department based on its violation of the governing administrative regulations did not mean, as Justice Powell had suggested, "that a similar action would be unavail-

§1983, each of these opinions looked instead to our opinion in *Cannon*, to the intent of the Congress that adopted Title VI and the contemporaneous executive decisionmakers who crafted the disparate-impact regulations, and to general principles of remediation.[7]

In summary, there is clear precedent of this Court for the proposition that the plaintiffs in this case can seek injunctive relief either through an implied right of action or through §1983. Though the holding in *Guardians* does not compel the conclusion that a private right of action exists to enforce the Title VI regulations against private parties, the rationales of the relevant opinions strongly imply that result. When that fact is coupled with our holding in *Cannon* and our unanimous decision in *Lau*, the answer to the question presented in this case is overdetermined.[8] Even absent my continued belief that Congress intended a private right of action to enforce both Title VI and its implementing regulations, I would answer

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able against a similarly situated private party." *Ibid.* I added the sentence that the Court quotes today, *ante* at 7, not to reserve a question, but rather to explain that the record did not support Justice Powell's hypothesis regarding the standard of proof. I thought then, as I do now, that a violation of regulations adopted pursuant to Title VI may be established by proof of discriminatory impact in a §1983 action against state actors and also in an implied action against private parties. See n. 5, *supra*. Contrary to the Court's partial quotation of my opinion, see *ante*, at 7, n. 3, what I wrote amply reflected what I thought. See 463 U. S., at 635 ("a private action against recipients of federal funds"), *id.*, at 636 ("implied caus[e] of action"); *id.*, at 638 ("Title VI authorizes appropriate relief").

Justice Powell was quite correct in noting that it would be anomalous to assume that Congress would have intended to make it easier to recover from public officials than from private parties. That anomaly, however, does not seem to trouble the majority today.

[7] See n. 5, *supra*.

[8] See also *Bazemore* v. *Friday*, 478 U. S. 385 (1986) *(per curiam)* (adjudicating on the merits a claim brought under Title VI regulations).

the question presented in the affirmative and affirm the decision of the Court of Appeals as a matter of *stare decisis*.[9]

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[9]The settled expectations the Court undercuts today derive not only from judicial decisions, but also from the consistent statements and actions of Congress. Congress' actions over the last two decades reflect a clear understanding of the existence of a private right action to enforce Title VI and its implementing regulations. In addition to numerous other small-scale amendments, Congress has twice adopted legislation expanding the reach of Title VI. See Civil Rights Restoration Act of 1987, §6, 102 Stat. 31 (codified at 42 U. S. C. §2000d–4a) (expanding definition of "program"); Rehabilitation Act Amendments of 1986, §1003, 100 Stat. 1845 (codified at 42 U. S. C. §2000d–7) (explicitly abrogating States' Eleventh Amendment immunity in suits under Title VI).

Both of these bills were adopted after this Court's decision in *Lau*, *Cannon*, and *Guardians*, and after most of the Courts of Appeals had affirmatively acknowledged an implied private right of action to enforce the disparate impact regulations. Their legislative histories explicitly reflect the fact that both proponents and opponents of the bills assumed that the full breadth of Title VI (including the disparate impact regulations promulgated pursuant to it) would be enforceable in private actions. See, *e.g.*, Civil Rights Act of 1984: Hearings on S. 2658 before the Subcommittee. on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 2d Sess., 530 (1984) (memo from the Office of Management and Budget objecting to the Civil Rights Restoration Act of 1987 because it would bring more entities within the scope of Title VI thereby subjecting them to "private lawsuits" to enforce the disparate impact regulations); *id.* at 532 (same memo warning of a proliferation of "discriminatory effects" suits by "members of the bar" acting as "private Attorneys General"); 134 Cong. Rec. 4257 (1988) (statement of Sen. Hatch) (arguing that the disparate impact regulations go too far and noting that that is a particular problem because "[o]f course, advocacy groups will be able to bring private lawsuits making the same allegations before federal judges"); see also Brief for United States 24, n. 16 (collecting testimony of academics advising Congress that private lawsuits were available to enforce the disparate impact regulations under existing precedent).

Thus, this case goes well beyond the normal situation in which "after a comprehensive reeaxmination and significant amendment" Congress "left intact the statutory provisions under which the federal courts had

II

Underlying the majority's dismissive treatment of our prior cases is a flawed understanding of the structure of Title VI and, more particularly, of the relationship between §§601 and 602. To some extent, confusion as to the relationship between the provisions is understandable, as Title VI is a deceptively simple statute. Section 601 of the Act lays out its straightforward commitment: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. §2000d. Section 602 "authorize[s] and direct[s]" all federal departments and agencies empowered to extend federal financial assistance to issue "rules, regulations, or orders of general applicability" in order to "effectuate" §601's antidiscrimination mandate. 42 U. S. C. §2000d–1.[10]

On the surface, the relationship between §§601 and 602 is unproblematic—§601 states a basic principle, §602 authorizes agencies to develop detailed plans for defining the contours of the principle and ensuring its enforcement. In the context of federal civil rights law, however, nothing is ever so simple. As actions to enforce §601's antidiscrimination principle have worked their way through the courts, we have developed a body of law giving content to §601's broadly worded commitment. *E.g.*, *United States* v.

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implied a private cause of action." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 381–382 (1982). Here, there is no need to rest on presumptions of knowledge and ratification, because the direct evidence of Congress' understanding is plentiful.

[10]The remainder of Title VI provides for judicial and administrative review of agency actions taken pursuant to the statute, §2000d–2; imposes certain limitations not at issue in this case, §§2000d–3 to 2000d–4; and defines some of the terms found in the other provisions of the statute, §200d–4a.

Fordice, 505 U. S. 717, 732, n. 7 (1992); *Guardians Assn.* v. *Civil Serv. Comm'n of New York City,* 463 U. S. 582 (1983); *Regents of Univ. of Cal.* v. *Bakke,* 438 U. S. 265 (1978). As the majority emphasizes today, the Judiciary's understanding of what conduct may be remedied in actions brought directly under §601 is, in certain ways, more circumscribed than the conduct prohibited by the regulations. See, *e.g.*, *ante,* at 5.

Given that seeming peculiarity, it is necessary to examine closely the relationship between §§601 and 602, in order to understand the purpose and import of the regulations at issue in this case. For the most part, however, the majority ignores this task, assuming that the judicial decisions interpreting §601 provide an authoritative interpretation of its true meaning and treating the regulations promulgated by the agencies charged with administering the statute as poor step-cousins—either parroting the text of §601 (in the case of regulations that prohibit intentional discrimination) or forwarding an agenda untethered to §601's mandate (in the case of disparate-impact regulations).

The majority's statutory analysis does violence to both the text and the structure of Title VI. Section 601 does not stand in isolation, but rather as part of an integrated remedial scheme. Section 602 exists for the sole purpose of forwarding the antidiscrimination ideals laid out in §601.[11] The majority's persistent belief that the two sections somehow forward different agendas finds no support in the statute. Nor does Title VI anywhere suggest, let alone state, that for the purpose of determining their legal effect, the "rules, regulations, [and] orders of general

[11] See 42 U. S. C. §2000d–1 (§602) ("Each Federal department and agency which is empowered to extend Federal financial assistance ... is authorized and directed to effectuate the provisions of [§601] ... by issuing rules, regulations, or orders of general applicability").

applicability" adopted by the agencies are to be bifurcated by the judiciary into two categories based on how closely the courts believe the regulations track the text of §601.

What makes the Court's analysis even more troubling is that our cases have already adopted a simpler and more sensible model for understanding the relationship between the two sections. For three decades, we have treated §602 as granting the responsible agencies the power to issue broad prophylactic rules aimed at realizing the vision laid out in §601, even if the conduct captured by these rules is at times broader than that which would otherwise be prohibited.

In *Lau*, our first Title VI case, the only three Justices whose understanding of §601 required them to reach the question explicitly endorsed the power of the agencies to adopt broad prophylactic rules to enforce the aims of the statute. As Justice Stewart explained, regulations promulgated pursuant to §602 may "go beyond . . . §601" as long as they are "reasonably related" to its antidiscrimination mandate. 414 U. S., at 571 (Stewart, J., joined by Burger, C. J., and Blackmun, J., concurring in result). In *Guardians*, at least three Members of the Court adopted a similar understanding of the statute. See 463 U. S., at 643 (STEVENS, J., joined by Brennan and Blackmun, JJ., dissenting). Finally, just 16 years ago, our unanimous opinion in *Alexander* v. *Choate*, 469 U. S. 287 (1985), treated this understanding of Title VI's structure as settled law. Writing for the Court, Justice Marshall aptly explained the interpretation of §602's grant of regulatory power that necessarily underlies our prior caselaw: "In essence, then, we [have] held that Title VI [has] delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that ha[ve] produced those impacts." *Id.*, at 293–294.

This understanding is firmly rooted in the text of Title VI. As §602 explicitly states, the agencies are authorized to adopt regulations to "effectuate" §601's antidiscrimination mandate. 42 U. S. C. §2000d–1. The plain meaning of the text reveals Congress' intent to provide the relevant agencies with sufficient authority to transform the statute's broad aspiration into social reality. So too does a lengthy, consistent, and impassioned legislative history.[12]

This legislative design reflects a reasonable—indeed inspired—model for attacking the often-intractable problem of racial and ethnic discrimination. On its own terms, the statute supports an action challenging policies of federal grantees that explicitly or unambiguously violate antidiscrimination norms (such as policies that on their face limit benefits or services to certain races). With regard to more subtle forms of discrimination (such as schemes that limit benefits or services on ostensibly race-neutral grounds but have the predictable and perhaps intended consequence of materially benefiting some races at the expense of others), the statute does not establish a static approach but instead empowers the relevant agencies to evaluate social circumstances to determine whether there is a need for stronger measures.[13] Such an approach

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[12] See, *e.g.*, 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey) ("Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination"); *id.*, at 1520 (statement of Rep. Celler) (describing §602 as requiring federal agencies to "reexamine" their programs "to make sure that adequate action has been taken to preclude . . . discrimination").

[13] It is important, in this context, to note that regulations prohibiting policies that have a disparate impact are not necessarily aimed only—or even primarily—at unintentional discrimination. Many policies whose very intent is to discriminate are framed in a race-neutral

builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress.

The "effects" regulations at issue in this case represent the considered judgment of the relevant agencies that discrimination on the basis of race, ethnicity, and national origin by federal contractees are significant social problems that might be remedied, or at least ameliorated, by the application of a broad prophylactic rule. Given the judgment underlying them, the regulations are inspired by, at the service of, and inseparably intertwined with §601's antidiscrimination mandate. Contrary to the majority's suggestion, they "appl[y]" §601's prohibition on discrimination just as surely as the intentional discrimination regulations the majority concedes are privately enforceable. *Ante*, at 7.

To the extent that our prior cases mischaracterize the relationship between §§601 and 602, they err on the side of underestimating, not overestimating, the connection between the two provisions. While our cases have explicitly adopted an understanding of §601's scope that is somewhat narrower than the reach of the regulations,[14]

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manner. It is often difficult to obtain direct evidence of this motivating animus. Therefore, an agency decision to adopt disparate-impact regulations may very well reflect a determination by that agency that substantial intentional discrimination pervades the industry it is charged with regulating but that such discrimination is difficult to prove directly. As I have stated before: "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." *Washington* v. *Davis*, 426 U. S. 229, 253 (1976) (concurring opinion). On this reading, Title VI simply accords the agencies the power to decide whether or not to credit such evidence.

[14] See, *e.g.*, *Alexander* v. *Choate*, 469 U. S. 287, 293 (1985) (stating, in dicta, "Title VI itself directly reach[es] only instances of intentional discrimination"); *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582 (1983) (in separate opinions, seven Justices indicate

they have done so in an unorthodox and somewhat haphazard fashion.

Our conclusion that the legislation only encompasses intentional discrimination was never the subject of thorough consideration by a Court focused on that question. In *Bakke*, five Members of this Court concluded that §601 only prohibits race-based affirmative action programs in situations where the Equal Protection Clause would impose a similar ban. 438 U. S., at 287 (principal opinion of Powell, J.); *id.*, at 325, 328, 352 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part).[15] In *Guardians*, the majority of the Court held that the analysis of those five Justices in *Bakke* compelled *as a matter of stare decisis* the conclusion that §601 does not on its own terms reach disparate impact cases. 463 U. S., at 610–611 (Powell, J., concurring in judgment); *id.*, at 612 (O'CONNOR, J., concurring in judgment); *id.*, at 642 (STEVENS, J., joined by Brennan and Blackmun, JJ.). However, the opinions adopting that conclusion did not engage in any independent analysis of the reach of §601. Indeed, the only writing on this subject came from two of the five Members of the *Bakke* "majority," each of whom wrote separately to reject the remaining Justices' understanding of their opinions in *Bakke* and to insist that §601 does in fact reach some instances of unintentional discrimination. 463 U. S., at 589–590 (White, J.); *id.*, at 623–624 (Marshall, J., dissenting).[16] The Court's occasional rote invocation of this

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that §601 on its face bars only intentional discrimination).

[15] Of course, those five Justices divided over the application of the Equal Protection Clause—and by extension Title VI—to affirmative action cases. Therefore, it is somewhat strange to treat the opinions of those five Justices in *Bakke* as constituting a majority for any particular substantive interpretation of Title VI.

[16] The fact that Justices Marshall and White both felt that the opin-

Guardians majority in later cases ought not obscure the fact that the question whether §601 applies to disparate-impact claims has never been analyzed by this Court on the merits.[17]

In addition, these Title VI cases seemingly ignore the well-established principle of administrative law that is now most often described as the "*Chevron* doctrine." See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). In most other contexts, when the agencies charged with administering a broadly-worded statute offer regulations interpreting that statute or giving concrete guidance as to its implementation, we treat their interpretation of the statute's breadth as controlling unless it presents an unreasonable construction of the statutory text. See *ibid.* While there may be some dispute as to the boundaries of *Chevron* deference, see, *e.g.*, *Christensen* v. *Harris County*, 529 U. S. 576 (2000), it is paradigmatically appropriate when Congress has clearly delegated agencies the power to issue regulations with the force of law and established formal procedures for the promulgation of such regulations.[18]

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ion they coauthored in *Bakke* did not resolve the question whether Title VI on its face reaches disparate-impact claims belies the majority's assertion that *Bakke* "had drawn precisely that distinction," *ante*, at 6, n. 2, much less its implication that it would have been "absurd" to think otherwise, *ibid.*

[17] In this context, it is worth noting that in a variety of other settings the Court has interpreted similarly ambiguous civil rights provisions to prohibit some policies based on their disparate impact on a protected group. See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432 (1971) (Title VII); *City of Rome* v. *United States*, 446 U. S. 156, 172–173 (1980) (§5 of the Voting Rights Act); cf. *Alexander* v. *Choate*, 469 U. S., at 292–296 (explaining why the Rehabilitation Act of 1973, which was modeled after §601, might be considered to reach some instances of disparate impact and then assuming that it does for purposes of deciding the case).

[18] In relying on the *Chevron* doctrine, I do not mean to suggest that

If we were writing on a blank slate, we might very well conclude that *Chevron* and similar cases decided both before and after *Guardians* provide the proper framework for understanding the structure of Title VI. Under such a reading there would be no incongruity between §§601 and 602. Instead, we would read §602 as granting the federal agencies responsible for distributing federal funds the authority to issue regulations interpreting §601 on the assumption that their construction will—if reasonable—be incorporated into our understanding of §601's meaning.[19]

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our decision in *Chevron* stated a new rule that requires the wholesale reconsideration of our statutory interpretation precedents. Instead, I continue to adhere to my position in *Sullivan* v. *Everhart,* 494 U. S. 83, 103–104, n. 6 (1990) (stating that *Chevron* merely summarized "well-settled principles"). In suggesting that, with regard to Title VI, we might reconsider whether our prior decisions gave sufficient deference to the agencies' interpretation of the statute, I do no more than question whether in this particular instance we paid sufficient consideration to those "well-settled principles."

[19]The legislative history strongly indicates that the Congress that adopted Title VI and the administration that proposed the statute intended that the agencies and departments would utilize the authority granted under §602 to shape the substantive contours of §601. For example, during the hearings that preceded the passage of the statute, Attorney General Kennedy agreed that the administrators of the various agencies would have the power to define "what constitutes discrimination" under Title VI and "what acts or omissions are to be forbidden." Civil Rights—The Presidents Program, 1963: Hearings before the Senate Committee on the Judiciary, 88th Cong., 1st Sess., 399–400 (1963); see also Civil Rights: Hearings before the House Committee on the Judiciary, 88th Cong., 1st Sess., pt. 4, p. 2740 (1963) (remarks of Attorney General Kennedy) (only after the agencies "establish the rules" will recipients "understand what they can and cannot do"). It was, in fact, concern for this broad delegation that inspired Congress to amend the pending bill to ensure that all regulations issued pursuant to Title VI would have to be approved by the President. See 42 U. S. C. §2000d–1 (laying out the requirement); 110 Cong. Rec. 2499 (1964) (remarks of Rep. Lindsay introducing the amendment). For further discussion of this legislative history, see *Guardians,* 463

To resolve this case, however, it is unnecessary to answer the question whether our cases interpreting the reach of §601 should be reinterpreted in light of *Chevron*. If one understands the relationship between §§601 and 602 through the prism of *either Chevron* or our prior Title VI cases, the question presented all but answers itself. If the regulations promulgated pursuant to §602 are either an authoritative construction of §601's meaning or prophylactic rules necessary to actualize the goals enunciated in §601, then it makes no sense to differentiate between private actions to enforce §601 and private actions to enforce §602. There is but one private action to enforce Title VI, and we already know that such an action exists.[20] See *Cannon*, 441 U. S., at 703.

III

The majority couples its flawed analysis of the structure of Title VI with an uncharitable understanding of the substance of the divide between those on this Court who are reluctant to interpret statutes to allow for private

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U. S., at 615–624 (Marshall, J., dissenting); Abernathy, Title VI and the Constitution: A Regulatory Model for Defining "Discrimination," 70 Geo. L. J. 1 (1981).

[20] The majority twice suggests that I "be[g] the question" whether a private right of action to enforce Title VI necessarily encompasses a right of action to enforce the regulations validly promulgated pursuant to the statute. *Ante*, at 6, n. 2, 17, n. 8. As the above analysis demonstrates, I do no such thing. On the contrary, I demonstrate that the disparate-impact regulations promulgated pursuant to §602 are—and have always been considered to be—an important part of an integrated remedial scheme intended to promote the statute's antidiscrimination goals. Given that fact, there is simply no logical or legal justification for differentiating between actions to enforce the regulations and actions to enforce the statutory text. Furthermore, as my integrated approach reflects the longstanding practice of this Court, see n. 2, *supra*, it is the majority's largely unexplained assumption that a private right of action to enforce the disparate-impact regulations must be independently established that "begs the question."

rights of action and those who are willing to do so if the claim of right survives a rigorous application of the criteria set forth in *Cort* v. *Ash*, 422 U. S. 66 (1975). As the majority narrates our implied right of action jurisprudence, *ante*, at 10–11, the Court's shift to a more skeptical approach represents the rejection of a common-law judicial activism in favor of a principled recognition of the limited role of a contemporary "federal tribunal." *Ante*, at 10. According to its analysis, the recognition of an implied right of action when the text and structure of the statute do not absolutely compel such a conclusion is an act of judicial self-indulgence. As much as we would like to help those disadvantaged by discrimination, we must resist the temptation to pour ourselves "one last drink." *Ante*, at 11. To do otherwise would be to "ventur[e] beyond Congress's intent." *Ibid.*

Overwrought imagery aside, it is the majority's approach that blinds itself to congressional intent. While it remains true that, if Congress intends a private right of action to support statutory rights, "the far better course is for it to specify as much when it creates those rights," *Cannon*, 441 U. S., at 717, its failure to do so does not absolve us of the responsibility to endeavor to discern its intent. In a series of cases since *Cort* v. *Ash*, we have laid out rules and developed strategies for this task.

The very existence of these rules and strategies assumes that we will sometimes find manifestations of an implicit intent to create such a right. Our decision in *Cannon* represents one such occasion. As the *Cannon* opinion iterated and reiterated, the question whether the plaintiff had a right of action that could be asserted in federal court was a "question of statutory construction," 441 U. S, at 688, see also *id.*, at 717 (REHNQUIST, J., concurring), not a question of policy for the Court to decide. Applying the *Cort* v. *Ash* factors, we examined the nature of the rights at issue, the text and structure of the statute, and the relevant legisla-

tive history.[21] Our conclusion was that Congress unmistakably intended a private right of action to enforce both Title IX and Title VI. Our reasoning—and, as I have demonstrated, our holding—was equally applicable to intentional discrimination and disparate impact claims.[22]

Underlying today's opinion is the conviction that *Cannon* must be cabined because it exemplifies an "expansive rights-creating approach." *Franklin* v. *Gwinnett County Public Schools,* 503 U. S. 60, 77 (1992) (SCALIA, J. concurring in judgment). But, as I have taken pains to explain, it was Congress, not the Court, that created the cause of action, and it was the Congress that later ratified the *Cannon* holding in 1986 and again in 1988. See 503 U. S., at 72–73.

In order to impose its own preferences as to the availability of judicial remedies, the Court today adopts a methodology that blinds itself to important evidence of congressional intent. It is one thing for the Court to ignore the import of our holding in *Cannon*, as the breadth of that precedent is a matter upon which reasonable jurists may differ. It is entirely another thing for the majority to ignore the reasoning of that opinion and the evidence contained therein, as those arguments and that

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[21] The text of the statute contained "an unmistakable focus on the benefited class," 441 U. S., at 691; its legislative history "rather plainly indicates that Congress intended to create such a remedy," *id.*, at 694; the legislators' repeated references to private enforcement of Title VI reflected "their intent with respect to Title IX," *id.*, at 696–698; and the absence of legislative action to change the prevailing view with respect to Title VI left us with "no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of prohibited discrimination," *id.*, at 703.

[22] We should not overlook the fact that *Cannon* was decided after the *Bakke* majority had concluded that the coverage of Title VI was coextensive with the coverage of the Equal Protection Clause.

evidence speak directly to the question at issue today. As I stated above, see n. 21, *supra*, *Cannon* carefully explained that both Title VI and Title IX were intended to benefit a particular class of individuals, that the purposes of the statutes would be furthered rather than frustrated by the implication of a private right of action, and that the legislative histories of the statutes support the conclusion that Congress intended such a right. See also Part IV, *infra*. Those conclusions and the evidence supporting them continue to have force today.

Similarly, if the majority is genuinely committed to deciphering congressional intent, its unwillingness to even consider evidence as to the context in which Congress legislated is perplexing. Congress does not legislate in a vacuum. As the respondent and the Government suggest, and as we have held several times, the objective manifestations of congressional intent to create a private right of action must be measured in light of the enacting Congress' expectations as to how the judiciary might evaluate the question. See *Thompson* v. *Thompson*, 484 U. S. 174 (1988); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 378–379 (1982); *Cannon*, 441 U. S., at 698–699.[23]

At the time Congress was considering Title VI, it was normal practice for the courts to infer that Congress intended a private right of action whenever it passed a statute designed to protect a particular class that did not contain enforcement mechanisms which would be thwarted by a private remedy. See *Merrill Lynch*, 456 U. S., at 374–375 (discussing this history). Indeed, the

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[23] Like any other type of evidence, contextual evidence may be trumped by other more persuasive evidence. Thus, the fact that, when evaluating older statutes, we have at times reached the conclusion that Congress did not imply a private right of action does not have the significance the majority suggests. *Ante*, at 13–14.

very year Congress adopted Title VI, this Court specifically stated that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 433 (1964). Assuming, as we must, that Congress was fully informed as to the state of the law, the contemporary context presents important evidence as to Congress' intent—evidence the majority declines to consider.

Ultimately, respect for Congress' prerogatives is measured in deeds, not words. Today, the Court coins a new rule, holding that a private cause of action to enforce a statute does not encompass a substantive regulation issued to effectuate that statute unless the regulation does nothing more than "authoritatively construe the statute itself." *Ante,* at 7.[24] This rule might be proper if we were the kind of "common-law court" the majority decries, *ante,* at 10, inventing private rights of action never intended by

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[24] Only one of this Court's myriad private right of action cases even hints at such a rule. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.,* 511 U. S. 164, 173 (1994). Even that decision, however, does not fully support the majority's position for two important reasons. First, it is not at all clear that the majority opinion in that case simply held that the regulation in question could not be enforced by private action; the opinion also permits the reading, assumed by the dissent, that the majority was in effect invalidating the regulation in question. *Id.,* at 200 (STEVENS, J., dissenting) ("The majority leaves little doubt that the Exchange Act does not even permit the SEC to pursue aiders and abettors in civil enforcement actions under §10(b) and Rule 10b–5"). Second, that case involved a right of action that the Court has forthrightly acknowledged was judicially created in exactly the way the majority now condemns. See, *e.g., Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 737 (1975) (describing private actions under Rule 10b-5 as "a judicial oak which has grown from little more than a legislative acorn"). As the action in question was in effect a common-law right, the Court was more within its rights to limit that remedy than it would be in a case, such as this one, where we have held that Congress clearly intended such a right.

Congress. For if we are not construing a statute, we certainly may refuse to create a remedy for violations of federal regulations. But if we are faithful to the commitment to discerning congressional intent that all Members of this Court profess, the distinction is untenable. There is simply no reason to assume that Congress contemplated, desired, or adopted a distinction between regulations that merely parrot statutory text and broader regulations that are authorized by statutory text.[25]

IV

Beyond its flawed structural analysis of Title VI and an evident antipathy toward implied rights of action, the majority offers little affirmative support for its conclusion that Congress did not intend to create a private remedy for violations of the Title VI regulations.[26] The Court offers

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[25] See *Guardians*, 463 U. S., at 636 (STEVENS, J., dissenting) ("It is one thing to conclude, as the Court did in *Cannon*, that the 1964 Congress, legislating when implied causes of action were the rule rather than the exception, reasonably assumed that the intended beneficiaries of Title VI would be able to vindicate their rights in court. It is quite another thing to believe that the 1964 Congress substantially qualified that assumption but thought it unnecessary to tell the Judiciary about the qualification").

[26] The majority suggests that its failure to offer such support is irrelevant, because the burden is on the party seeking to establish the existence of an implied right of action. *Ante*, at 17, n. 8. That response confuses apples and oranges. Undoubtedly, anyone seeking to bring a lawsuit has the burden of establishing that private individuals have the right to bring such a suit. However, once the courts have examined the statutory scheme under which the individual seeks to bring a suit and determined that a private right of action does exist, judges who seek to impose heretofore unrecognized limits on that right have a responsibility to offer reasoned arguments drawn from the text, structure, or history of that statute in order to justify such limitations. Moreover, in this case, the petitioners *have* marshaled substantial affirmative evidence that a private right of action exists to enforce Title VI and the regulations validly promulgated thereunder. See *supra*, at 21–22. It strikes me that it aids rather than hinders their case that this evidence

essentially two reasons for its position. First, it attaches significance to the fact that the "rights-creating" language in §601 that defines the classes protected by the statute is not repeated in §602. *Ante*, at 13–14. But, of course, there was no reason to put that language in §602 because it is perfectly obvious that the regulations authorized by §602 must be designed to protect precisely the same people protected by §601. Moreover, it is self-evident that, linguistic niceties notwithstanding, any statutory provision whose stated purpose is to "effectuate" the eradication of racial and ethnic discrimination has as its "focus" those individuals who, absent such legislation, would be subject to discrimination.

Second, the Court repeats the argument advanced and rejected in *Cannon* that the express provision of a fund cut-off remedy "suggests that Congress intended to preclude others." *Ante*, at 14. In *Cannon*, 441 U. S., at 704–708, we carefully explained why the presence of an explicit mechanism to achieve one of the statute's objectives (ensuring that federal funds are not used "to support discriminatory practices") does not preclude a conclusion that a private right of action was intended to achieve the statute's other principal objective ("to provide individual citizens effective protection against those practices"). In support of our analysis, we offered policy arguments, cited evidence from the legislative history, and noted the active support of the relevant agencies. *Ibid.* In today's decision, the Court does not grapple with—indeed, barely acknowledges—our rejection of this argument in *Cannon*.

Like much else in its opinion, the present majority's unwillingness to explain its refusal to find the reasoning in *Cannon* persuasive suggests that today's decision is the unconscious product of the majority's profound distaste for

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is already summarized in an opinion of this Court. See *Cannon*, 441 U. S., at 691–703.

implied causes of action rather than an attempt to discern the intent of the Congress that enacted Title VI of the Civil Rights Act of 1964. Its colorful disclaimer of any interest in "venturing beyond Congress's intent," *ante,* at 11, has a hollow ring.

V

The question the Court answers today was only an open question in the most technical sense. Given the prevailing consensus in the Courts of Appeals, the Court should have declined to take this case. Having granted certiorari, the Court should have answered the question differently by simply according respect to our prior decisions. But most importantly, even if it were to ignore all of our post-1964 writing, the Court should have answered the question differently on the merits.

I respectfully dissent.

Mr. BACHUS. Thank you. I want to close just by saying that I have tremendous respect for you.

Attorney General ASHCROFT. Thank you.

Mr. BACHUS. I actually wish that, as the gentleman from Massachusetts called you Senator Ashcroft, I wish we could continue to call you Senator Ashcroft. We might not have some tactical problems.

Chairman SENSENBRENNER. If the gentleman will yield, once a Senator always a Senator.

Mr. BACHUS. That's right. I wish he was still an active Senator.

Attorney General ASHCROFT. I suppose that would be true unless someone graduated to the House afterward.

Chairman SENSENBRENNER. That would be a very wise person.

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman, and thank you, General Ashcroft. As you well know, I'm one of two Members of this body that presented her views at your confirmation hearing. And I hope that you realize that the position was on principle, disagreement over a number of issues, but let me thank you for the quick response that I have secured or obtained on some issues which I'm going to discuss today in terms of you and your staff returning at least a call to give me further information, and I believe that what we're doing today is both unique and important, providing a hearing so that we can for the first time in 20 years have an authorization bill, which I think is crucial. If there's a tool

for democracy and justice in the United States it—certainly one great aspect of it is the Department of Justice.

So I would like to raise some questions out of great concern to me. Briefly, I would like to say you have heard a number of inquiries regarding the INS. It seems that the Committee, Subcommittee I serve on, is quite popular and what I would offer to say to you is I believe the President in his campaigning really captured where I think we need to go and I hope that you will review his remarks, and that is that we need two entities that are well financed but we need a singular head or someone who will be responsible for the agency. And I have met Mr. Ziglar and I can't pretend to appoint him, but I believe he is a grounded individual that will give good leadership.

I hope that you will look at the legislation that I am offering, H.R. 1562, Immigration and Accountability Restructuring Act—H.R. 1562, we'll provide your staff with it—that analyzes the INS, provides the support for the law enforcement, but also recognizes the problems that so many Members have talked about, which is denying the quick access to legalization for those who desire so.

The other aspect of the immigration work that I hope that you will work with us on is this whole issue of unaccompanied immigrant children, we know a very well renowned story and we won't focus on that. We'll focus on the thousands of children who come and we have no basis of dealing with them. I hope you will look at my legislation on that, the Unaccompanied Immigrant Children Due Process Act of 2001, and I know that I can get a response back from your staff so I'm not necessarily asking for one on that point.

Moving on, I would like to raise some issues that are of crucial concern to me, and I have some letters. I hope my comments do not diminish my respect for the men and women in blue, but police brutality is real. Racial profiling is real. I have a case in Harris County, with the Harris County Sheriff's Department, and I will give to you today the letters that are evidence of or, if you will, allegations of discriminatory practices. It's a case that came through the EEOC. There were allegations of African American deputies being referred to as monkeys, a Confederate flag in a sheriff's parking lot, a lot of allegations. This came under the clock of the previous administration, but the Civil Rights Section has it now.

I need, we need an expedited review of this in order to help clean up a department that can afford to be cleaned up. We have done it in the Houston Police Department. We've had some tragedies recently. We've lost some deputies, and I offer my deepest sympathy, but the issue is for us to be able to respect law enforcement, we must have law enforcement that respects us.

So I will ask for a response on that, but let me conclude on some other remarks.

Police brutality is the fact that Tommy Thomas in Cincinnati is dead and 15 black men were killed. Police brutality is the fact that Amadou Diablo as well was shot in New York, and I'd like to be able to hear from you probably in writing what you will be doing that matches racial profiling with the issue of police brutality and I think that is very important.

Let me move on now to the Federal Bureau of Investigation because, as I said, these are questions that I hope will be answered.

The FBI, the Hanssen case, the Wen Ho Lee and the McVeigh case, I frankly believe that, while certainly a respecter of the FBI, that we have a problem. It is broken. The McVeigh case is a definite and definitive result of whatever the problems were in their investigatory practices. I would like a status report of the Inspector General's efforts, and I would like to hear from you as well, Mr. Attorney General, on your practices or your attempts to work on those issues.

Chairman SENSENBRENNER. The time of the gentlewoman has expired.

Ms. JACKSON LEE. I will submit other questions in the record, and I thank you so very much. Sorry for the fact that it was a series of questions, but I thought it was important to get these issues on the record.

Chairman SENSENBRENNER. Let me remind the Attorney General and the folks from Justice that he has brought with him that the responses should be directed to the Committee for inclusion in the record.

And finally, last and certainly not least, the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman, and I thank the Attorney General for being with us this afternoon and also thank him for his hospitality when we had the occasion to visit him in his office for the breakfast meeting that we had there and for his comments, particularly, about sporting events. So I want to join my colleagues on the other side in complimenting the quality of the staff members that you got from the Judiciary Committee. I know all of them are fine lawyers.

But I also want to express some concern that justice and the appearance of justice can often be impacted by the appearance of diversity and I notice behind you you've got a lot of staff people, certainly good gender diversity. I'm wondering how you're coming on the other kinds of diversity, racial diversity in particular, what progress are you making on putting together your staff in a racially diverse way?

Attorney General ASHCROFT. Well, I thank you for that question. I feel honored that so many individuals of outstanding talent have agreed to join me in my administration. I am grateful that the Senate of the United States has recently confirmed Larry Thompson to be the Deputy Attorney General.

Mr. WATT. Has he started?

Attorney General ASHCROFT. He has started. He is on the job, and rather than sit behind me, he's running the Department while I'm here.

Mr. WATT. That's good.

Attorney General ASHCROFT. Charles James, another African American, is slated to be the head of the Civil—pardon me, the Antitrust Division.

Mr. WATT. Without asking you to go through every one of them, maybe we could just get some profile information submitted to the Committee for the record, otherwise.

Attorney General ASHCROFT. I just think we will have the most diverse Justice Department, including its leadership, that has ever visited the Justice Department and, frankly, I just don't particu-

larly like to characterize it that way. I like to characterize it as the most talented. These are individuals of outstanding capacity.

Mr. WATT. Those things are not mutually exclusively and I certainly agree with you. When we met recently, I expressed to you some concerns about the charitable choice provisions, and one of the concerns I expressed about legislation was the prospect of mixing government money and church funds and the prospect of allowing proselytization and my concern that somewhere down the road there will be an onset of indictments about the use of Federal funds in some of these programs. If you find that there is overt proselytizing going on, do you think it would be difficult to divide the religious and the secular in evaluating the prospect of prosecuting somebody for improper use of Federal funds in these faith-based initiatives as they are being proposed?

Attorney General ASHCROFT. I want to say, I believe that this is an important issue and it's one that was very carefully considered when this legislation was crafted, carefully debated. And there are some groups whose evangelization efforts are so intertwined with any remedial efforts that they would probably be ineligible to use or participate in the faith-based operations. The safeguards of the laws are such that——

Mr. WATT. Would you prosecute those people if they improperly used Federal funds?

Attorney General ASHCROFT. We would take whatever actions were appropriate to restore to the Federal Government and to secure for the Federal Government compliance with the law.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. WATT. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Mr. Attorney General, after 3 hours it's over. Let me thank you on behalf of the Committee. I have been on this Committee for over 22 years. I have seen a large number of Attorneys General come and go, but none of them have been before this Committee for as long a period of time and discussing as substantive a response as you have, and I think the Committee wants to thank you for that and this certainly has been much different testimony than previous Attorneys General have conducted in both Democratic and Republican administrations.

Let me point out that by my count there are 28 Members of the Committee that asked you questions. You didn't have any preparation on what was on our mind. This was probably worse than appearing on Regis Philbin's show on Who Wants To Be a Millionaire, because nobody knows what he's going to ask and you really weren't able to call up and get a lifeline in case you were stumped on them.

So I think that this has been very useful in terms of our being able to put together an authorization bill to give advice perhaps a little bit more powerful in nature to the appropriators than they have gotten before.

Now I have one further question, Mr. Attorney General. Was this as bad as you feared?

Attorney General ASHCROFT. Well, I think this is constructive and I want to thank the Committee.

I will be very honest. This is not the kind of day that you say, oh, boy, I get to go and answer questions for 3 hours. Anybody who

comes here and tells you that will lie to you about other things, but I have a deep respect for the Congress of the United States and it establishes the policy which is to be carried out and it establishes it in conjunction with the President, and I think a good interchange is important.

I hope that it's important for you to hear my responses and I know it's very important for me to hear your concerns, and I hear them very clearly when I sit here in this position, maybe even more clearly than when I hear about them when I am down in the Justice Department.

So I think this is very valuable for what I learn, and I hope that it's a way that we can promote our ability to speak with each other and I certainly want to make my responses both in content and in character responses that promote communication which will provide a basis upon which we can elevate the level of service that we accord to the American people, because we're in the service industry of making sure that the American people are served and that their freedoms are guarded.

Chairman SENSENBRENNER. And we feel the same way, and there being no further business before the Committee, the Committee stands adjourned.

[Whereupon, at 5 p.m., the Committee was adjourned.]

APPENDIX

STATEMENTS SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

At the outset, I want to thank the Attorney General for being here today and for the outreach he has undertaken this year. I appreciate the Attorney General's consistent efforts to maintain a dialogue with Democrats.

Mr. Attorney General, in the most respectful terms possible, I must tell you that at this early stage of your tenure that some actions of the Department have been very troubling to me and run counter to your confirmation hearing representations that you would enforce the law and run a Department free from politics.

Elected officials, like everyone in this country, deserve to be tried in the courts not smeared in the press. Sadly, when it comes to Senator Robert Torricelli, your Justice Department has been leaking like Niagara Falls.

This public flogging of Torricelli appears to have increased considerably within 48 hours of Senator Jeffords' party switch, creating an impression, true or false, that this White House and the Justice Department intends to use the criminal justice processes to retake the Senate.

There is one way you can help relieve that impression—that is to follow the precedent established by your predecessor, Republican Attorney General Dick Thornburgh in the first Bush Administration. When the Department leaked damaging information and innuendo on a member of Congress from the other party, he conducted a thorough investigation, using polygraph examinations, which ultimately discovered the source and relieved him of his duties.

This becomes especially important given the fact that you commented on the Torricelli matter in a fundraising letter, using the unfortunate word "corruption," that you sent out last year. Anything less than a duplication of the Thornburgh investigation will simply reinforce the perception, true or false, that the Department's is using the criminal justice system to re-take the Senate.

So I call on you today to conduct such an independent investigation, and would like you to address whether you will in your remarks.

I am also extremely troubled by a letter you wrote to James Jay Baker of the National Rifle Association. In this letter, you indicated that you believed in an individual, as opposed to collective, right to bear arms. In doing so, you appeared to breathe life into a Texas Judge's extreme and activist ruling that the Brady Law's prohibition on wife beaters having guns is unconstitutional under the Second Amendment.

We need to know whether this means that you believe the Brady Act and Assault Weapons Ban are unconstitutional and whether the Department will now take that position in the Texas *Emerson* case.

I am also troubled by the daily prayer sessions that you lead at your federal, public office. I'm glad you pray, I do too. But I wonder whether you have the sensitivity to see the other side. Such prayer sessions in your office can create an atmosphere where people feel silently ostracized if they don't participate, where there's an unspoken rule that compatibility with their boss depends on their participating in his faith. Can't you see how some people would feel as a result that they have to choose between job and faith?

In your confirmation hearings you said "The Attorney General must lead a professional, non-partisan Justice Department that is uncompromisingly fair, defined by integrity and dedicated to upholding the rule of law." I hope today we can discuss to what extent these actions I have described live up to these ideals.

MATERIAL SUBMITTED FOR THE HEARING RECORD

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your request for the views of the Department of Justice on H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act" and answers the management and budgetary follow-up questions, submitted on June 8, 2001, that were directed to the Attorney General following his testimony at the Committee's June 6, 2001, hearing on this issue.

H.R. 2215 would authorize appropriations for the Department for the coming year, FY 2002, and would enact a number of permanent provisions into law that would enhance or govern Departmental activities and administration. The Department has suggestions and observations about several sections of the bill. Subject to the following comments and concerns, the Department of Justice supports enactment of H.R. 2215.

Section 101. This section of the bill would authorize specific funding levels for various Departmental appropriations accounts. The Department agrees with the proposed levels but has concerns about one provision in paragraph 101(4) that would create a substantive earmark within an account. Paragraph (4), relating to the General Legal Activities account, contains a provision that would mandate a minimum funding level for the investigation and prosecution of certain denaturalization and deportation cases (page 4, lines 1-4). The Department opposes language of this nature, as it would require specific funding levels for particular programs, thereby making it more difficult for the Attorney General to make available appropriated funds to offices and divisions affected by the account. Indeed, such earmarks make it very difficult to absorb the ebbs and tides of fiscal appropriations from year to year. It is important to note that the Criminal Division places heavy emphasis on the cases identified in this section – historically dedicating well over the proposed minimum funding level for cases of this nature – and currently foresees meeting the substance of this proposed requirement, making an earmark entirely unnecessary as a practical matter.

Along the same lines, the Department is opposed to two alternative proposals suggested (but not adopted) during the Committee's mark-up of H.R. 2215 that would have authorized spending for the Civil Rights Division separately from other spending from the Department's General Legal Activities appropriations account. The first proposal would have created a separate appropriations account for the Division; the second would have earmarked or mandated a minimum funding level for the Division within the existing General Legal Activities account. The Department believes the first proposal to be very unwise. The Department enjoys relatively-great freedom in reprogramming funds (i.e., in moving funds within an appropriations account) but is much more constricted in the transfer of funds (i.e., in moving funds between appropriations accounts). Creating two separate appropriations accounts would cause significant movements of funds between the litigating Divisions to be prohibited by statute. In the past, the Civil Rights Division has been the beneficiary of such movements of funds.[1] The Department believes that creating a separate account would likely have a deleterious impact on Civil Rights Division resources and would therefore oppose the proposal if it were offered again.

The second proposal, which would have mandated a minimum funding level for the Civil Rights Division within the existing General Legal Activities appropriations account could also have detrimental effects, similar to those discussed above. As an historical matter, the President's budget request for the General Legal Activities account has rarely, if ever, been fully funded. Between 1995 and 2001, for example, the difference between the President's budget request and the actual funding levels has ranged from $6,442,000 to $58,376,000. Hence, if the proposal were enacted, spending from the General Legal Activities account would disproportionately go to the Civil Rights Division and force the Attorney General to require other Divisions to absorb the full impact of any under funding. This could have a crippling impact on all the other Divisions served by the General Legal Activities account. An example of this may be seen from the FY1997 appropriations cycle: In that year, $23,054,000 was cut from the President's request for the General Legal Activities account, but the Appropriations Act mandated that no cut be made to Criminal Division's operations. As a result of the earmark, nearly $7,000,000 of the cut had to be absorbed by the Civil Rights Division alone, the Department having little discretion to do otherwise. The proposal to mandate a minimum level of funding for the Civil Rights Division would create a similar situation, but potentially an even more harmful one, because of Civil Rights' relative size when compared to other Divisions of the Department. Importantly, the Attorney General, in the exercise of his or her discretion, has historically favored the Civil Rights Division. For example, while the number of full-time-equivalent positions authorized for the Civil Rights Division rose from 572 to 713 between 1995 to 2001, only four full-time-equivalent positions were added to remaining General Legal Activities Divisions during the same period. The Department therefore opposes this proposal.

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[1]In 1999, for example, in two separate procedures, $8,030,000 (over and above the funds directly appropriated to it) was moved into the Civil Rights Division from other sources; the remaining General Legal Activities received only $4,138,000. In 1996, in a single procedure, Civil Rights received an additional $2,000,000.

Section 102. This section of the bill would require the Attorney General to appoint two hundred additional Assistant United States Attorneys. Unlike earlier versions of this proposal, this provision would authorize but not require the Attorney General to fill the proposed new positions by transferring attorneys from the litigating divisions of the Department. The proposed direction to hire more Assistant United States Attorneys would likely result in some such transfers, at least, because of budgetary pressures on the Department. Indeed, the President's budget submission for FY2002 requests funding for a total of one-hundred twenty-one new Assistant United States Attorneys, echoing the same concern about adequate litigation resources in the field that motivated inclusion of section 102. Assuming that the President's request for FY 2002 is fully funded, this section's practical, external effect would be limited to a transfer of a minimum of seventy-nine attorney positions. While bearing the concerns suggested above in mind, as well as the uncertainties inherent in the appropriations process, the Department does not oppose this section. The Department encourages the Committee to make subsection (d) consistent with subsection (a) in the flexibility afforded the Attorney General by striking the phrase "for fiscal year 2002" (page 8, line 21).

Section 201. This section of the bill would make several authorities of the Department of Justice permanent law and collect them into one section of title 28 of the United States Code. The clarity afforded by such an approach is deemed by some to be desirable, in that it would streamline the annual appropriations process considerably and harmonize often-disparate expressions of the same authority currently found in various appropriations and authorization statutes. If this provision is retained, the Department would suggest the addition of "protection," after "compensation," in section 201(b)(3), to reflect more accurately the current objects of expenditure of the appropriation account for Fees and Expenses of Witnesses. The Department fully supports the provisions found in section 201.

The Department is aware that the Committee has expressed interest in enacting a new, general rewards statute. The Department is concerned that Congress tread carefully in this area. Current rewards statutes, such as 18 U.S.C. § 3059B, are probably sufficient to ensure the appropriate handling of payments of rewards. There are complexities involved in creating a new statute in an area in which current law is operating satisfactorily. For example, given the desired comprehensive nature of a proposal in this area, some interactions with current provisions may be overlooked or may be difficult to resolve, and unforeseen consequences could develop. In short, a sweeping change has a potential for creating difficulties rather than producing improvements. To the extent there may be a need for new authorities, we would prefer that specific statutory authorities be enacted relating to the areas in which there is a demonstrated need for change. However, in response to questions posed by the Committee, we have suggested one possible approach below (in our response to question number one of Chairman Sensenbrenner's follow up questions).

Section 202. This section of the bill would require the Attorney General and other executive-branch officials to report to the Congress under a variety of circumstances. As an initial matter, the Department notes that the section appears to be an expansion of a provision in

the current Departmental appropriations authorization act, and follows efforts in prior Congresses, starting in 1984, to limit the authority of the Executive Branch not to acquiesce in court decisions. Most recently, the 106th Congress considered enacting H.R. 1924, the "Federal Agency Compliance Act," which (a) would have required federal agencies to follow an adverse court of appeals decision within that judicial circuit, except in certain enumerated circumstances; and (b) would have required federal officials to avoid "unnecessarily repetitive litigation" of legal issues decided against the government by three or more courts of appeals. H.R. 1924 and all similar legislative efforts have failed, having received the strenuous opposition of the Department, under both Republican and Democratic Administrations. See, e.g., letter from Rex Lee, Solicitor General, to the Congress, 130 Cong. Rec. 25,977 (1984); testimony of Carolyn B. Kuhl, Deputy Assistant Attorney General (1984); testimony of Stephen W. Preston, Deputy Assistant Attorney General (1997); testimony of William B. Schultz, Deputy Assistant Attorney General (1999).

The Department has based its opposition to proposed nonacquiescence legislation on several grounds, aside from questions of constitutionality. First, such legislation is unnecessary because nonacquiescence is rare, and our ordinary litigation and appeals procedures already work well to prevent agencies from unreasonably refusing to acquiesce in court precedents. Second, the government needs the flexibility to deal with those unusual situations in which it is firmly believed that an appellate decision is wrong and, if followed, would seriously impair the administration of a statutory program, but in which immediate review by the Supreme Court is effectively unavailable. Additionally, such proposed legislation threatens to create a whole new category of litigation over whether the government had in fact violated the provisions on nonacquiescence. Moreover, the Department has opposed intimations by some that nonacquiescence by an agency is violative of the Constitution.

Additionally, to eliminate possible ambiguity as to the Committee's intent with regard to the exclusion of federal district court decisions that are not binding on the other courts of the circuit or the district[2], the Department recommends that the phrase "any standing rule of decision (binding upon courts of, or inferior to those of, that jurisdiction) established by a final decision of any court of, or superior to those of, that jurisdiction" (page 19, lines 8-12) be changed to "any standing rule of decision established by a final decision of the United States court of appeals of that jurisdiction," for the sake of clarity.

Further, it must be stressed that, because the Department has no system currently in place for tracking policies, determination, or approvals of the kind covered by section 202, the section's retrospective reporting requirements would prove very burdensome, if not all-but-impossible to comply with. We are particularly concerned about applying the reporting requirements of proposed 28 U.S.C. 530D to the President. Accordingly, the Department

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[2] See In re Executive Office of the President, 215 F.3d 20, 24 (D.C. Cir. 2000); Abbs v Sullivan, 963 F.2d 918, 924 (7th Cir. 1994); Threadgill v. Armstrong World Indus., 928 F. 2d 1366, 1371 (3rd Cir. 1991); City Stores v. Lerner Shops, 410 F.2d 1010, 1014 (D.C. Cir. 1969).

suggests that clauses 202(b)(4)(A)(i) and (ii) be amended by adding "of which he is aware" before "described," and by striking clause 202(b)(4)(A)(iii) entirely. We also recommend that the President be excluded from the coverage of this provision.

The reporting requirement fashioned by the bill's framers in section 202 of H.R. 2215, although covering broader ground than earlier legislative efforts, largely avoids their serious infirmities and thus (unlike those other efforts) is not opposed in principle by the Department. As the section relates to settlement agreements and consent decrees, however, the Department is particularly concerned about the potential burdens associated with preparing reports to the Congress. It would be difficult in a great many settlements to report, without disclosing privileged information: (a) the reasons for the settlement, as required under the primary procedure; or (b) the legal and factual bases of the settlement, as required under the alternative procedure. Documenting the precise grounds for privilege in each case would consume substantial attorney resources, yet not provide useful information to the Congress. The burden would be especially great in settlements involving injunctive relief.

Section 204. We note that section 204, specifically subparagraph (a)(3)(B), seems to preclude the Department from funding any security enhancement or equipment to any non-governmental entity. The Department through its grant making arm – the Office of Justice Programs – encourages partnerships that cross non-governmental and the public/governmental sectors to assist neighborhoods and communities prevent and control crime. Proposals cover the entire range of the criminal justice system including: prevention, enforcement, incarceration, and aftercare. Many of these projects are managed out of non-governmental facilities in the community where the public safety is a concern. As a result, the use of funds to enhance security around such publicly funded projects may be a necessary component to a program's success. Usually, a portion of funding for enhancing security is the purchase of state-of-the-art equipment and the hiring and training of qualified personnel to use the equipment and deal with related public safety issues. Removing this use of funds could jeopardize the success of many community-wide projects and the partnerships that support them. For example, this legislation would threaten security enhancements for domestic violence/battered women's shelters, non-governmental drug treatment clinic, and other facilities that prevent and control crime.

Further, the requirement would effectively end the Office of Justice Program's ability to support a substantial number of our technical assistance initiatives. The vast majority of these non-governmental technical assistance providers request equipment to provide services to the field. Furthermore, this requirement would likely and substantially impact many of the identified Congressional earmarked projects since most are non-governmental agencies and nearly all of these applicants request equipment within their proposals.

In sum, we remain concerned about this provision. We would, however, welcome an opportunity to discuss any perceived problems that might have precipitated this proposal.

Section 205. This section of the bill would enact a variety of technical and miscellaneous amendments to Department of Justice authorities that would prove very helpful in improving the operation and management of Departmental resources, by clarifying statutory amendments and by correcting longstanding scrivener errors in the Assets Forfeiture Fund's organic statute, increasing the per-award amounts that may be paid from that Fund, enhancing the Department's authorities in certain transfers of forfeited property, providing standards for certain record-keeping functions of the Department, correcting clerical errors in the Code, and statutorily authorizing the Federal Bureau of Investigation to protect the person of the Attorney General. In connection with this latter provision, we would suggest that, rather than amending 28 U.S.C. § 533(2), the bill should instead set forth a new section 533(3), as follows: "(3) to assist in the protection of the person of the Attorney General.". Existing section 533(3) would be redesignated as new section 533(4).

The Department supports the clarifying amendment to the Assets Forfeiture Fund's (Fund) organic statute that resolves the ambiguity regarding the scope of two amendments to the statute enacted on the same day in 1992 (Public Laws 102-393 and 102-395). In considering this language, the Department requests that this bill be further amended by deleting references to subparagraph 524(c)(1)(A)(ii) from lines 1 and 16 on page 29. This retains the Attorney General's discretion to use the Fund to reimburse any Federal agency participating in the Fund for investigative costs leading to seizures as provided for in Public Law 102-393. We believe that it is essential for the Attorney General to retain the flexibility to sustain major investigations with significant forfeiture potential when the need arises.

We also recommend deleting lines 7 and 8 on page 29. That is, we object to the proposed amendment of 28 U.S.C. 524(c) (2) insofar as it would delete the words "for information" everywhere it appears. This change would have the effect of creating a dollar limit for the payment of awards from the Asset Forfeiture Fund for assistance, and not just for the payment of awards for information as in current law. The current provision places a limit on the payment of awards from the Fund in those cases where the cooperating person supplies merely information and nothing more. No cap is provided in those cases where the cooperating person provides assistance, which, although not defined, is something more than just information (e.g., setting up purchases, wearing a wire, providing additional witnesses, testifying if required, and other activities that may require very substantial payments). This distinction should be retained. While we recommend the deletion of lines 7 and 8 of page 29 of the bill, we agree that the $250,000 cap should be raised to $500,000. Therefore, we agree with the bill's amendment in lines 9 and 10 of page 29.

Further to the end of improving the operation and management of Departmental resources, the Department suggests the inclusion of additional language, which would: (1) ensure that no inference is created that the government is liable for interest on certain payments the Department (under current law) must make retrospectively; and (2) enhance the Department's authority to allocate resources to improve financial systems and debt-collection activities. Suitable language to address the above concerns can be found in part A of the answer

to question 4 from Chairman Sensenbrenner's follow-up questions (attached).

Section 206. Section 206 is intended to make changes to current law in order to prevent waste, fraud, and abuse. However, the Department has serious concerns about subsections (a), (b) and (e). Section 206(a) would amend 28 U.S.C. § 529 to require annual reports to Congress concerning grants, cooperative agreements, and programmatic services by or on behalf of the Office of Justice Programs during the preceding year. Section 206(b) would amend the criminal anti-lobbying statute, 18 U.S.C. § 1913, to expand the persons covered by the statute, the scope of communications covered by the statute, and the type and level of government falling within the statute. Section 206(e) would expand existing reporting requirements relating to the Department's efforts to enforce the intellectual property laws.

Section 206(a), which if enacted, would require a performance review of every grant, cooperative agreement, and program services contract that "ends" in the preceding year at face value, would be cost prohibitive. The Office of Justice Program's Office of Comptroller only has resources to perform financial reviews of approximately 1,700 of our 44,000 active awards combining both in-house and on-site reviews. This represents only between 7-9 percent of the Departments active funding. This level of financial review is based on a stratified statistical sampling. The Government Accounting Office (GAO) regularly audits our grant administration and has supported our current level of financial grant monitoring. Similarly, in recent years, the Office of Justice Programs has generally been receiving clean audit opinions[3]. Moreover, requiring sworn statements by grant recipients runs contrary to our business practices and reputations built up over time, where our emphasis has been on assisting recipients achieve their goals and public purpose. We currently have the necessary tools through existing grant regulations, as well as criminal and civil statutes that could be used to address a problem with a grant recipient if needed. The current practice is working and additional language is not needed.

Section 206(a) raises an additional concern about resource allocation by requiring the Office of Justice Programs to complete reports with detailed descriptions about every unsuccessful applicant for every grant program. For example, with 11 grant programs, the Violence Against Women Office (VAWO) might receive more than 2,200 applications. Similarly, in FY 2000, the Bureau of Justice Assistance administered 15 separate line item grant programs and awarded over 8,684 grants and payments. The number of applications far exceeds the numbers of awards made for competitive grant programs. For example, under the Bureau of Justice Assistance's 1999 Open Solicitation Program alone, the Bureau of Justice Assistance received 1,392 concept papers and made 22 awards. To provide the information requested in the legislation would present great administratively difficulties and could well overwhelm the ability of the Department to comply. The preponderance of our grant programs have similar ratios of number of applicants to the number of grants awarded. It is a better use of the Office of Justice

[3] The Department is aware that the GAO, on some occasions, has noted that the Department should increase program monitoring. However, we do not believe that those recommendations rise to the level of review envisioned here.

Programs resources for offices and bureaus to provide customer service, administer programs, and monitor existing projects.

Also, the reporting requirements required under subsection 206(a) are onerous and may take considerable systems development, programming, or merging of many files (some of which may be incompatible) from the various program offices. Further, many of our grant programs already require reporting to Congress. For example, Section 1003 of the Violence Against Women Act of 2000 (P.L. 106-386) created a biennial reporting requirement to balance Congress' need for information about the grant funded projects with the impact on the states and local jurisdictions. The biennial requirement was established in order to minimize the drain on resources required to provide information about the effectiveness of the programs. Section 206(a) duplicates the requirements of VAWA 2000 and makes them more onerous for grantees by requiring an annual report. Additionally, further definition would be needed. For example, the term "ended" (page 32, line 7) could be interpreted to mean end-date of the grant *or* when the grant is closed out. There are many similar "terms-of-art" in the grant business. The term "performance review" *per se* does not have a standard meaning and would require clarification. Again, while every current grant recipient is required to submit semi-annual performance statements, OJP lacks sufficient resources to review every grant.

In sum, the Department provides information to Congress about all awards made by providing a copy of the project summary. Through the Office of Justice Programs annual reports, we report on all the grant programs administered by the Department. Additionally, we make available through postings on the Web and through the Clearinghouse all program evaluations. Simply put, the Department believes the grant program review envisioned by section 206(a) would make administering many programs cost prohibitive and in fact create wasteful practices, rather than eliminate them.

Section 206(b) proposes significant - non technical - amendments to 18 U.S.C. § 1913. In its present form, the Anti-Lobbying Act prohibits officers or employees of the United States from using funds appropriated by Congress to engage in grass roots lobbying by activating the general public to influence legislation or appropriations matters before the Congress unless expressly authorized by Congress.

The Anti-Lobbying Act has been construed narrowly by the Department since its enactment in 1919. However, Section 206(b) would expand the scope of 18 U.S.C. § 1913 by broadening the class of individuals covered by the statute, the nature of the governmental processes falling within the statute, and the branches and levels of governmental offices covered. The expanded reach of the statute is likely to result in a significant and unnecessary increase in the number of alleged violations, opening a virtual "Pandora's box." This in turn will increase the Criminal Division's casework in this area, requiring increased time for the review and investigation of allegations and for prosecution of violations when warranted. Specifically, the amendments would extend the statutory prohibition: (1) to any person operating pursuant to federal funds, not just officers and employees of the executive branch; (2) to the legislative and

judicial branches of the federal government, as well as state and local governments, not just members of Congress; and (3) to all deliberative matters before government bodies, not just legislation and appropriations matters. The Department believes that the amendment proposed here would go too far, and that the actual (and we believe unintentional) impact of the changes envisioned would have a dramatic effect on our ability to enforce the Act. Hence, the Department believes the proposed changes found in section 206(b) are ill advised.

Section 206(e) would expand existing reporting requirements relating to the Department's efforts to enforce the intellectual property laws. We oppose this provision for several reasons. First, increasing reporting requirements in this way creates an administrative burden and diverts resources that would otherwise be used to combat crime. In this regard, subsection (e) appears particularly burdensome, as it could be interpreted to impose an ongoing obligation on the prosecutor to track the prison status of convicted defendants. Burdensome reporting requirements might even dissuade some Assistant United States Attorney's from pursuing these cases.

Some of the sections also appear vague and could be interpreted in a variety of ways. For example, proposed subparagraph (A) (page 34, line 12-15) requires the reporter to fit into categories the intellectual property that is the object of the crime. Issues would of course arise about what qualifies, for example, as "business software." Moreover, many cases involve lots of different kinds of software. It is our belief that it is impractical and unhelpful to try to fit intellectual property into such categories. Similarly, it is unclear what the phrase "involving an online element" (page 34, lines 16-17) found in proposed subparagraph (B) means. For example, if the intellectual property is trademarked sunglasses, but the conspirators communicate via e-mail about when a shipment will arrive, does the case involve an "online element"? If section (B) is read broadly, most cases would fall into this category, making the data collected unhelpful.

Section 303. This section of the bill would require the President to submit to the Judiciary Committee of each House of Congress "such proposed legislation authorizing appropriations for the Department of Justice for fiscal year 2003 as the Attorney General shall judge necessary and expedient." The Department suggests that the words "the Attorney General" be replaced with "he," to conform more closely to the language of the Recommendations Clause of the Constitution (Article II, Section 3) – which gives the President the authority to determine when it is advisable to propose legislation to Congress – and remove the somewhat-anomalous requirement that would be imposed on the President, to report on the suggestions of his subordinate, the Attorney General. Alternatively, the requirement that any authorizing legislation deemed to be "necessary and expedient" be submitted at the time the President's budget is transmitted, could be directed to the Attorney General, rather than the President.

Section 304. This section of the bill would create a temporary Deputy Inspector General, within the Office of the Inspector General of the Department, having specific responsibility for oversight of programs and operations of the Federal Bureau of Investigation, and would require a variety of Departmental actions relating to such oversight. The Justice Department believes that

this provision is unnecessary. On July 11, 2001, the Attorney General signed an administrative order enlarging the original jurisdiction of the Office of the Inspector General of the Department of Justice to include investigations of alleged criminal wrongdoing and serious administrative misconduct by FBI employees. In addition, on June 20, 2001, the Attorney General directed the Deputy Attorney General to undertake a comprehensive review of the FBI. Consequently, the Department believes that statutory action such as that proposed in this section is not needed.

Section 306. Section 306 proposes new additional reporting requirements for the use of DCS1000 (formerly known as "Carnivore"). As the Committee is aware, the Department is already obligated under 18 U.S.C. § 2519 to make detailed reports concerning all applications for Title III interception orders, which includes reporting on those orders whose implementation involves the use of DCS1000. Reporting under that provision already includes such information as "the nature of the facilities from which or the place where the communications were to be intercepted," as well as the offense specified in the application and the fact that an application was granted, modified, or denied. See 18 U.S.C. § 2519(1)(c), (e), (g) & (2)(a). The parallel reporting requirement in the pen register and trap and trace statute was substantially expanded last year to encompass similar information. See Pub. L. 106-197, § 3, May 2, 2000, 114 Stat. 247 (amending 18 U.S.C. § 3126).

The Department does not oppose a suitable procedure for reporting appropriate information concerning those orders involving the use of DCS1000, but does not believe that section 306 in its current form best accomplishes that. We are willing to work with the Committee in developing an appropriate reporting arrangement on this matter.

Sections 401 through 404.

In general, the Department fully supports the authorization and appropriation of federal grants to address and, ultimately, to end violence against women. Title IV of H.R. 2215 would statutorily create a Violence Against Women Office (VAWO) within the Department of Justice with a Director who would be appointed by the President, by and with the consent of the Senate, and who would answer directly to the Attorney General.

The Department is concerned that separating VAWO from the Office of Justice Programs (OJP) would diminish VAWO's ability to administer its grant programs effectively and efficiently. Congress has directed that OJP lead the states in efficiently managing federal criminal justice grants. The mission of the existing OJP is to offer federal leadership and resources to help state and local communities formulate policies and create programs that prevent and control crime, including domestic violence, sexual assaults, and stalking.

OJP, as authorized by Congress, is responsible for ensuring that federal grants for crime prevention and response are wisely and efficiently managed. OJP's Office of the Comptroller sees that grant monies are distributed to the states and local communities on time, and in conformity with federal financial management guidelines. OJP's Office of Administration has implemented an on-

line grants management system that allows states, tribes, and localities to apply for grants and make financial and programmatic reports on-line. OJP's Office of Congressional and Public Affairs has established an orderly system for notifying members of Congress about upcoming grant awards and responding to congressional inquiries about grant programs. Our Offices of General Counsel and Office for Civil Rights provide expert legal guidance on issues specific to grantmaking. Housing these administrative services under one OJP roof enhances the quality and consistency of the financial, programmatic, and legal management of all of OJP's five bureaus and six program offices.

In addition, changing the Director position to presidential appointee requiring Senate confirmation is unnecessary, and will only impede the President's ability to fill this position in a timely manner. It should remain a non-confirmed presidential appointment.

As directed by Congress, the Department is continuing to formulate a plan for reorganizing OJP's offices, bureaus, and programs to create an even more efficient, coordinated, and "user-friendly" grantmaking process within the Justice Department. We intend to ensure that this OJP reorganization plan, creating a Violence Against Women Office, will highlight the critical importance of focusing federal resources to end violence against women.

* * * * *

Thank you for the opportunity to present the Department's views. Please do not hesitate to call upon me if I may be of additional assistance. The Office of Management and Budget has advised that, from the perspective of the Administration's program, there is no objection to submission of this report.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

House Committee on the Judiciary
Questions for the Hearing Record Relating to Administrative,
Budgetary, and Management Issues
Oversight Hearing of the Department of Justice
June 6, 2001

1. The Committee is aware that there are many overlapping/conflicting statutes authorizing, governing, and/or limiting the payment of rewards by the Attorney General (and/or components of the Department of Justice) for information and/or assistance in law-enforcement. Please provide the Committee with a comprehensive list of all such statutes. Additionally, the Committee requests suggestions from the Department for language (suitable for inclusion in a Department appropriations authorization bill) that could be used to harmonize and/or replace those statutes and an explanation/justification for any such suggestions.

ANSWER: The offer of rewards – payments to individuals who offer information pursuant to a public advertisement – is an important tool the Department uses in order to gather information in furtherance in of its law-enforcement mission. The Department often offers rewards to the public in cases where we lack useful information from other sources, and rewards are intended to entice members of the public who may have helpful information but are disinclined to come forward. The Department understands the Committee's questions to only address the payment of rewards as defined above and not to touch on (in any way) the purchase of evidence or information from confidential informants. The latter, of course, is an integral part of the Department's ability to discover, and successfully prosecute criminals and criminal enterprises. The ability of the Department and its components to receive and pay for information from confidential sources is a extremely sensitive issue and the Department would oppose strenuously any attempt to infringe on our authorities in this area.

As noted in the Department's views letter on H.R. 2215, we have concerns regarding the creation of a new, general reward statute. However, if the Committee is intent on amending the authority which the Department has to make awards, we offer the following to assist the Committee in its efforts.

The Department's authority to make reward payments can be found in a number of statutes, including 12 U.S.C. § 4209; 18 id. §§ 1031, 1751, 3059, 3059A, 3059B, & 3071-77; 21 id. § 886; and 28 id. § 524; and Pub. L. 101-647, secs. 2565 and 2569 (12 U.S.C. §§ 4205 and 4209); additionally, the Department's appropriations act contains two such provisions: The appropriation paragraph entitled "Counterterrorism Fund" and section 106 of the (Department of Justice) General Provisions. Some of these statutes however, also affect distribution of funds for purchase of evidence and payments for information. The following language would be acceptable to the Department in order to replace/harmonize the various reward statues currently found throughout the Code:

"(D) PAYMENT OF REWARDS.--Funds available to the Attorney General may be used for--

"(i) the payment of rewards (meaning payments pursuant to public advertisements for assistance to the Department of Justice), in accordance with procedures and regulations established or issued by the Attorney General: provided That--

"(I) no such reward shall exceed $2,000,000 (unless a statute should authorize a higher amount);

"(II) no such reward of $250,000 or more may be made or offered without the personal approval of either the Attorney General or the President;

"(III) the Attorney General shall give written notice to the Chairmen and ranking minority members of the Committees on Appropriations and the Judiciary of the Senate and of the House of Representatives not later than 30 days after the approval of a reward under subclause (II);

"(IV) any executive agency or military department (as defined, respectively, in sections 105 and 102 of title 5) may provide the Attorney General with funds for the payment of rewards; and

"(V) neither the failure to make or authorize such a reward nor the amount of any such reward made or authorized shall be subject to judicial review."

"Sec.___ REPEALERS.--Title 18 of the United States Code is amended--

"(a) by striking sections 3059, 3059A, 3059B, 3075, and all the matter after the first sentence of 3072; and

"(b) Public Law 101-647 is amended in section 2565, by replacing all the matter after "title," in subsection (c)(1) with "the Attorney General may, in his discretion, pay a reward to the declaring." and by striking subsection (e); and by striking section 2569.".

2. The Committee is aware that the Counterterrorism Fund, properly speaking, has never itself been statutorily authorized. The Committee requests suggestions from the Department for language (suitable for inclusion in a Department appropriations authorization bill) that could be used to authorize the Fund.

ANSWER: The Department notes that section 208 of H.R. 2215 as marked up by the Committee on June 20, 2001 contains a provision that would statutorily authorize the Counterterrorism Fund. The Department supports section 208 of H.R. 2215.

3. The Committee is aware that the annual appropriations acts relating to the Department of Justice contain many provisions (including general provisions) that are re-enacted year after year, unchanged. In an effort to streamline the annual appropriations process, should any of those provisions be permanently authorized and why?

ANSWER: Annual appropriations acts often contain general provisions (referred to as riders) that are enacted into law year after year, with little change. Riders often complicate passage of the annual appropriations act, and thus, the Department has made a concerted effort in recent years to have these riders enacted into permanent law. At present, only a few riders, all dealing with the same subject matter (prohibition on the use of appropriated funds to pay for abortions for prisoners) remain underacted into permanent law. Although the basic underlying subject matter is a source of political contention, it is very telling that these three riders have been annually re-enacted in various forms since 1987, nearly fifteen years straight. Moreover, their re-enactment has occurred despite kaleidoscopic changes of party control of the political branches (Democrats controlling both Houses of Congress but not the White House; Democrats controlling both Houses of Congress and the White House; and Republicans controlling both Houses of Congress but not the White House), if only because it suggests that the riders themselves are not particularly controversial or, if controversial, are well settled. Accordingly, the Department requests that the riders be removed from the already sufficiently cumbersome annual appropriations process and enacted (perhaps after joining them into a single provision) into permanent law.

In addition, there is one rider that has been repeatedly enacted in the annual appropriations bill which imposes limits on the aggregate amount of rewards that made be paid in one year in combating terrorism. This provision, too, should be enacted into permanent law, so as to streamline the annual appropriations process.

4. The Committee requests suggestions from the Department for language (suitable for inclusion in a Department appropriations authorization bill) that could be used to improve the administration, financial management, and operations of the Department. The Department should also include an explanation/justification for any such suggestion.

ANSWER: The Department has the following suggestions for inclusion in H.R. 2215:

A. Further to the end of improving the operation and management of Departmental resources, the Department suggests the addition of the following new language at the end of Section 205 of H.R. 2215, which would (1) ensure that no inference is created that the government is liable for interest on certain payments the Department (under current law) must make retrospectively; and (2) enhance the Department's authority to allocate resources to improve financial systems and debt-collection activities.

"(f) Hereafter, no compensation or reimbursement paid pursuant to section 501(a) of Public Law 99-603 (100 Stat. 3443) or section 241(i) of the Act of June 27, 1952 (ch. 477), shall be subject to section 6503(d) of title 31, United States Code, and no funds available to the Attorney General may be used to pay any assessment made pursuant to such section 6503 with respect to any such compensation or reimbursement.

"(g) Section 108 of Public Law 103-121 (107 Stat. 1164) is amended by replacing "three" with "six", by replacing "only" with ",first,", and by replacing "litigation." with

"litigation, and, thereafter, for financial systems, and other personnel, administrative, and litigation expenses of debt collection activities.".

B. During the past decade, a public safety crisis has developed in Puerto Rico and the U.S. Virgin Islands (USVI) that directly affects vital U.S. interests. The Department's Puerto Rico/U.S. Virgin Islands (USVI) Initiative named the FBI as the lead agency in the effort to combat the drug and crime problems. However, the FBI's ability to achieve the goals and objectives encompassed in this Initiative effectively and efficiently is contingent upon maintaining an experienced, well-trained workforce. The FBI has historically encountered great difficulty in attracting, recruiting, relocating and retaining an effective workforce in San Juan due to several negative quality of life factors that affect agents who are stationed there. These conditions include difficulty in obtaining affordable and safe housing, difficulty in finding adequate medical care, and cultural challenges.

There is currently no regulation that allows the payment of a retention bonus to a Special Agent to remain in a specific location. There is authority under 5 C.F.R., Part 575, Subpart C, for the payment of a retention allowance, to retain an essential employee, if there is a determination that the employee would be likely to leave the FBI. Nonetheless, statutory authority to retain law enforcement personnel for longer than their initial tour is needed in order for our efforts to have effect on the drug and crime problems that are in existence in Puerto Rico. The Department of Justice (DOJ) Puerto Rico Executive Working Group has crafted the following – budget neutral – draft legislation that would amend Title 5, United States Code, to create a new section which would authorize extended assignment incentives:

Sec. ___. STRENGTHENING LAW ENFORCEMENT IN U.S. TERRITORIES, COMMONWEALTHS AND POSSESSIONS.

(a) Chapter 57 of Title 5, United States Code, is amended–

(1) in subchapter IV by adding at the end the following new section:

*"§ 5757. **Extended assignment incentive***

"(a) The head of an Executive agency may pay an extended assignment incentive to an employee if–

"(1) the employee has completed at least 2 years of continuous service in one or more civil service positions located in a territory or possession of the United States, the Commonwealth of Puerto Rico or the Commonwealth of the Northern Mariana Islands;

"(2) the agency determines that replacing the employee with another employee possessing the required qualifications and experience would be difficult; and

"(3) the agency determines it is in the best interest of the Government to encourage the employee to complete a specified additional period of employment with the agency in the territory or possession, the Commonwealth of Puerto Rico or

Commonwealth of the Northern Mariana Islands, except that the total amount of service performed in a particular territory; commonwealth or possession under one or more agreements established under this section may not exceed 5 years.

"(b) The sum of extended assignment incentive payments for a service period may not exceed the greater of –

"(1) an amount equal to 25 percent of the annual rate of basic pay of the employee at the beginning of the service period, times the number of years in the service period; or

"(2) $15,000 per year in the service period.

"(c)(1)Payment of an extended assignment incentive shall be contingent upon the employee entering into a written agreement with the agency specifying the period of service and other terms and conditions under which the extended assignment incentive is payable.

"(2) The agreement shall set forth the method of payment, including any use of an initial lump-sum payment, installment payments, or a final lump-sum payment upon completion of the entire period of service.

"(3) The agreement shall describe the conditions under which the extended assignment incentive may be canceled prior to the completion of agreed-upon service period and the effect of the cancellation. The agreement shall require that if, at the time of cancellation of the incentive, the employee has received incentive payments which exceed the amount which bears the same relationship to the total amount to be paid under the agreement as the completed service period bears to the agreed-upon service period, the employee shall repay that excess amount, at a minimum, except that an employee who is involuntarily reassigned to a position stationed outside the territory, commonwealth or possession or involuntarily separated (not for cause on charges of misconduct, delinquency, or inefficiency) may not be required to repay any excess amounts.

"(d) An agency may not put an extended assignment incentive into effect during a period in which the employee is fulfilling a recruitment or relocation bonus service agreement under section 5753 or for which an employee is receiving a retention allowance under section 5754.

"(e) Extended assignment incentive payments may not be considered part of the basic pay of an employee.

"(f) The Office of Personnel Management may prescribe regulations for the administration of this section, including regulations on an employee's entitlement to retain or receive incentive payments when an agreement is canceled. Neither this section nor implementing regulations may impair any agency's independent authority to administratively determine compensation for a class of its employees."; and (2) in the

analysis by adding at the end the following: "5757. Extended assignment incentive.".

(b) Section 5307(a)(2)(B) of Title 5, United States Code, is amended by striking "or 5755" and inserting "5755", or "5757".

(c)The amendments made by this Act shall take effect on the first day of the first applicable pay period beginning on or after 6 months after the date of enactment of the Act.

(d) No later than three years after the effective date of this section, the Office of Personnel Management, after consultation with affected agencies, shall submit a report to the Congress assessing the effectiveness of the extended assignment incentive authority as a human resources management tool and making recommendations for any changes necessary to improve the effectiveness of the incentive authority. Each agency shall maintain such records and report such information, including the number and size of incentive offers made and accepted or declined by geographic location and occupation, in such format and at such times as the Office of Personnel Management may prescribe, for use in preparing the report.

C. The Department is strongly in favor of inclusion of the following section in Title III of H.R. 2215 which could be used to provide the Attorney General with additional authorities, all of which were requested by the President in his budget submission for FY2002:

SEC. ___. ADDITIONAL AUTHORITIES OF THE ATTORNEY GENERAL.

(a) Section 151 of the Foreign Relations Act, fiscal years 1990 and 1991 (5 U.S.C. 5928 note) is amended by inserting "or Federal Bureau of Investigation" after "Drug Enforcement Administration".

(b) For fiscal year 2002 and thereafter, whenever the Federal Bureau of Investigation participates in a co-operative project to improve law-enforcement or national-security operations or services with a friendly foreign country on a cost-sharing basis, any reimbursements or contributions received from that foreign country to meet its share of the project may be credited to appropriate current appropriations accounts of the Federal Bureau of Investigation. The amount of a reimbursement or contribution credited shall be available only for payment of the share of the project expenses allocated to the participating foreign country.

(c) For fiscal year 2002 and thereafter, the Attorney General is authorized to establish and collect a fee to defray the costs of railroad police officers participating in a Federal Bureau of Investigation law-enforcement training program authorized by Public Law 106-110, and to credit such fees to the appropriation account "Federal Bureau of Investigation, Salaries and Expenses", to be available until expended for salaries and expenses incurred in providing such services.

(d) In instances where the Attorney General determines that law enforcement-, security-, or mission-related considerations mitigate against obtaining maintenance or repair services from private-sector entities for equipment under warranty, the Attorney General is authorized to seek reimbursement from such entities for warranty work

performed at Department of Justice facilities, and to credit any payment made for such work to any appropriation charged therefor.

(e) Section 286 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1356) is amended--

(1) in subsection (d), by replacing "$6" with "$7";

(2) in subsection (e)--

(A) in paragraph (1), by replacing "No" with "Except as provided in paragraph (3), no"; and

(B) by adding a new paragraph (3) as follows:

"(3) The Attorney is authorized to charge and collect $3 per individual for the immigration inspection or pre-inspection of each commercial vessel passenger whose journey originated in the United States or in any place set forth in paragraph (1): provided, That this authorization shall not apply to immigration inspection at designated ports of entry of passengers arriving by the following vessels, when operating on a regular schedule: Great Lakes international ferries, or Great Lakes vessels on the Great Lakes and connecting waterways." and

(3) in subsection (q)--

(A) in clause (1)(A)(ii), by replacing "(1)" with "(i)"; and:

(B) in paragraph (2), by inserting ", including receipts for services performed in processing forms I-94, I-94W, and I-68, and other similar applications processed at land border ports of entry," after "subsection".

5. Please provide the following information relating to the Office of the Inspector General (OIG):

a) the amounts requested by the OIG, the Department, and the President for and appropriated to (including all reimbursable agreements) the OIG in FY 1990 through FY 2002; and

b) the number of full-time equivalents (FTE) authorized at the OIG for each of those fiscal years.

ANSWER: Please see the following chart. Note: pursuant to a Memorandum of April 25, 2001, from the Deputy Director of the Office of Management and Budget to all Heads of Executive Departments and Agencies, entitled "Confidentiality of Pre-Decisional Budget Information," we are unable to provide all of the information requested. That Memorandum directs, in part, that "the Executive Branch's internal deliberations regarding [the budget] should remain a matter of internal record. Examples of confidential budget information are an agency component's budget requests to the agency [and] the agency's budget requests to OMB. . . ."

DEPARTMENT OF JUSTICE
OFFICE OF THE INSPECTOR GENERAL (OIG)
HISTORY OF RESOURCES FYs 1990-2002
($ = thousands)

FY	President's Request To Congress	Appropriated By Congress	Reimbursements Earned	TOTAL Authorized Budget	TOTAL Authorized FTE
1990	$20,541	$20,541	$2,483	$23,024	333
1991	28,382	25,140	2,625	27,765	353
1992	36,019	28,820	6,315	35,135	379
1993	31,770	30,622	7,520	38,142	431
1994	30,898	30,000	7,675	37,675	416
1995	30,582	30,484	7,637	38,121	396
1996	36,744	31,383	6,850	38,233	377
1997	51,949	31,985	10,788	42,773	390
1998	33,211	33,358	15,337	48,695	460
1999	34,610	34,236	12,804	47,040	441
2000	45,021	40,235	5,078	45,313	377
2001	42,192	41,521	5,935	47,456	367
2002	45,495	*N/A*	3,260*	*N/A*	*N/A*

6. Numerous statutes require the Department to compile reports on various matters, such as section 808 of the Antiterrorism and Effective Death Penalty Act, P.L. 104-132. Should any of these reporting requirements be eliminated? If they should be eliminated, please explain why?

ANSWER: The Department of Justice is required by statute to provide Congress with numerous reports concerning both its operations and other matters of interest to Congress. While we recognize that many particular reports have proven beneficial to both Congress and the Department, we are also concerned that other required reports may request information duplicative of other reports or information that is not currently available to the Department. In particular, we believe that there are some ongoing reporting requirements imposed on the Department in past years whose usefulness may have lapsed.

We also note that the number of reporting requirements imposed on the Department has been increasing. For example, at the end of the 106th Congress, Congress enacted nearly 40 new reporting requirements for the Department, half of which would be recurring reports.

The Federal Reports Elimination and Sunset Act of 1995 provided for the sunset of a number of ongoing reports for the Department, and for many other agencies. That Act reflected a recognition of the burdens imposed upon agencies in meeting these reporting requirements. Congress, however, restored most of these reports in Public Law 106-197, a bill to exempt certain reports from automatic elimination and sunset.

The Department has previously recommended that section 808 of the Antiterrorism and Effective Death Penalty Act of 1996 be eliminated. As part of its continuing efforts to improve its effectiveness, the Department plans to undertake a fresh review of the ongoing reporting requirements imposed by Congress, and to make recommendations on how the reporting process can be improved. The Department would welcome the opportunity to work with the Committee to determine which reporting requirements could properly be eliminated.

7. Please provide the Committee with a list of any outdated, duplicative, or otherwise unneeded statutory authority that should be repealed as part of a Department appropriations authorization bill.

ANSWER: Those changes identified by the Department are included in the answers provided above.

8. The Department's annual appropriation routinely places restrictions on the Department Leadership Program and the Offices of Legislative and Public Affairs in terms of positions, workyears, appropriation amounts, and augmentation through the use of details. The Department has proposed that these restrictions be eliminated from the FY 2002 appropriation bill. How do the staffing and funding levels for these offices compare to similar offices of other major Departments or agencies, and why should these restrictions be eliminated?

ANSWER: The leadership offices at the Department of Justice provide critical policy and logistic support in furtherance of the Department's mission. Congress and the President constantly rely on the Department to provide fast, thorough and accurate opinions on legal, policy, budget and operational questions of critical importance to the legislative process. The Department places a high priority on responding to Congressional requires and initiatives, including hearings, markups, requests for the Department's views on legislation, assistance with constituent matters, as well as policy, technical and issue briefings for members of Congress and their staffs. Similarly, other leadership offices work to make sure that policy directives -- whether stemming from legislation or executive initiatives -- are quickly, properly and efficiently implemented. The Department works hard to ensure that the public, other branches of government, Congress and the President can obtain information about the Department's activities in a helpful and efficient manner. The Office of Legislative Affairs, for example, has the responsibility for coordinating and responding quickly to Congressional requests and inquiries. It also has responsibility for devising and implementing the legislative strategy to carry out the Attorney General's initiatives requiring Congressional action. Similarly, the Office of

Legislative Affairs acts to coordinate articulation to Congress of the views of the Department.

Our efforts to provide Congress, the public, and the President with the highest possible levels of responsiveness and care have been greatly hampered in recent years by strict budgetary caps. Since FY 1996, the Office of Legislative Affairs (OLA), the Office of Public Affairs (OPA) and the leadership programs of the Department of Justice have had congressionally imposed caps in place on personnel and funding. Since that time these offices have had to absorb annual mandatory cost-of-living increases and step increases with no commensurate change in appropriation. The only relief afforded these offices are noted in the chart below. In addition, beginning in FY 99 the OLA and OPA were allowed to augment staff with non-reimbursable detailees as long as those offices did not exceed the cap.

Department of Justice Leadership Offices

Year	Pos	FTE	Dollars	Constant 1996 dollars
1996	43	44	7,477,000	7,477,000
1997	43	44	7,477,000	7,309,000
1998	43	44	7,860,000	7,566,000
1999	43	44	8,136,000	7,662,000
2000	43	44	8,136,000	7,413,000
2001	43	44	8,136,000	7,184,000

(The increases between 1997 and 1998, and between 1998 and 1999, were adjustments to base. No program increases received for these offices.)

Office of Legislative Affairs & Office of Public Affairs

Year	Pos	FTE	Dollars	Constant 1996 dollars
1997	41	48	4,660,000 (equaled actual obligations for 95)	4,555,000
1998	41	48	4,660,000 - no augmentation of staff allowed	4,486,000
1999	41	48	4,811,000 - no augmentation of staff allowed	4,537,000
2000	41	48	4,811,000 *	4,384,000
2001	41	48	4,811,000 *	4,248,000

(* For 2000 and 2001, appropriation permits use of non reimbursable details in OLA/PAO up to the capped FTE level. IE. If OLA/PAO could afford 40 FTE with the dollars provided, they could have 8 non reimbursable detail FTEs also.)

A direct comparison with other cabinet level departments was complex and did not prove effective in demonstrating either a need to eliminate the restrictions nor a need to continue them. Many of the departments which are somewhat similar in size are organized differently than the Department of Justice or do not have field or overseas representation. The Treasury Department, for example, may be somewhat similar in size and organization, but Main Treasury does not have

large, centralized legislative or public affairs offices. Our crude review revealed that some other Executive Branch agencies combine their legislative functions with their intergovernmental operations making it difficult to compare. Still others rely exclusively on individual components to handle public or congressional inquiries, with no centralized oversight. It should also be noted that OLA and the Office of Legal Policy also perform functions that are often performed at other agencies by an office of general counsel, such as review of regulations and legislation, further complicating comparisons.[4]

Furthermore, in addition to size and mission of agencies, a major workload factor for any office of legislative affairs is the quantity of legislation, oversight and other activity that each agency reviews. Aside from the Office of Management and Budget, the Department of Justice is responsible for reviewing more pieces of legislation and related material than any other agency in the executive branch. For example, during the 106th Congress, approximately 9,193 written congressional inquiries were received by the Department and controlled by the Department's Executive Secretariat. All of these inquiries were handled in some manner by OLA.

In addition, during the 106th Congress, OLA has reviewed, revised (or drafted) or otherwise prepared responses to approximately 1,283 written policy inquiries and 5,694 written constituent inquiries. The OLA correspondence office fields more than 150 telephonic inquiries each month to assist congressional staff members with both policy and constituent inquiries. In addition, the OLA front office staff fields more than 1,000 telephonic inquiries each month that are either handled by the front office or referred to the attorneys and/or professional staff. The questions have spanned all aspects of Departmental operations and activities, and OLA has also taken the lead in making sure that timely follow up information has been provided on matters of specific interest to Members.

Moreover, there has been an increase in the workload of this office since these caps were imposed in 1996. Congressional oversight requests have increased in both volume and scope, requiring resource intensive efforts to accommodate these inherently difficult issues. Of course OLA is also intimately involved in the appointment and confirmation of Administration officials and federal judges, preparing witnesses for hearings, and providing written views on legislation. In addition, new Administrations may require the Department of Justice to handle the nominations of 93 United States Attorney and U.S. Marshals, as is currently the case. All of this takes place while conducting triage of responding to Member letters, staff calls and simple constituent referrals – all of which are characterized as "urgent" by the requesting congressional office.

Operating under the congressionally imposed caps inhibits the Department's ability to quickly and fully respond to the public, the Congress, and to the White House. We would be able to better serve the Congress and the government were these caps to be lifted.

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[4] The Department did discover that there is at least one other department whose legislative function has been capped by Congress.

9. The Federal Detention Trustee was established in the FY 2001 appropriations bill. What is the responsibility of the Federal Detention Trustee, and should this office be authorized as part of a Department appropriations authorization bill?

ANSWER: The Department notes that section 201 of H.R. 2215 as marked up by the Committee on June 20, 2001 contains a provision that would statutorily authorize the Federal Detention Trustee (page 16, line 22 - page 17, line 12) . The Department supports this provision of section 201 of H.R. 2215.

10. How has the FBI's National Domestic Preparedness Office been affected by the President's May 8, 2001, statement, which appeared to place primary anti-terrorism responsibility with the Federal Emergency Management Agency, and should the Committee include a permanent authorization for the NDPO as part of a Department appropriations authorization bill? Please fully explain or justify your answer.

ANSWER: The future mission of the NDPO is currently under consideration within the Administration.

Answers to Follow-Up Questions to the Attorney General from Ranking Member Conyers

1. Mr. Bush's budget eliminates hiring funds for community policing. What impact would this have on the more than 100,000 local police officers hired under the COPS program? Has your office (or any other office within the Justice Department) contacted any specific local police departments to assess the extent, if any, that in the future they will be able to make up the lost hiring funds and retain the police officers? If so, please share any specific findings or information from local police departments in that regard with me.

Answer: The FY 2002 budget request does not disrupt or affect the commitments made to put 100,000 more police on the streets. In fact, COPS has funded more than 110,000 officers, and that number may reach 115,000 by the end of the current fiscal year. Agencies are aware that they are responsible for retaining officers once a grant expires, and the COPS office works closely with every grantee to help them plan for retention.

The President's budget request builds upon the efforts made to add community police officers and emphasizes the advancement of community policing by investing in law enforcement technology. The Administration is requesting $180 million to hire up to an additional 1,500 School Resource Officers and $100 million for technology grants for state and local law enforcement under the COPS program.

Staff members at the Department are in continuous contact with numerous state and local law enforcement agencies, and organizations which represent them, to ensure that the state and local perspective is taken into account as Department policies and programs are discussed and implemented.

2. The Administration's FY 2002 budget includes no money for the immigration backlog reduction account created last year by Congress. Does the Administration plan to request funds for the account as intended by Congress?

Answer: The Administration requested $100 million for backlog reduction in FY 2002 -- $80 million in appropriated funds and $20 million from Premium Processing Service fees. The $100 million represents the first installment of the President's five-year, $500 million initiative to attain a universal six-month processing standard for all immigration applications and petitions, while providing quality service to legal immigrants, citizens, businesses, asylees, refugees, and all other INS customers. The Administration proposed this funding within existing accounts, versus using the authorized Immigration Services and Infrastructure Improvements account.

Answers to Follow-Up Questions to the Attorney General from Representative Gekas

1. **State Criminal Alien Assistance Program (SCAAP)**

Why does the Administration's budget proposal reduce the federal funds appropriated for state aid packages that help cover the costs of criminal immigrants by $299 million? What does the Administration propose as alternatives?

Answer: The State Criminal Alien Assistance Program (SCAAP) is a payment program designed to provide federal assistance to states and localities who incur costs for incarcerating certain criminal aliens who are being held as a result of state and/or local charges or convictions. States and localities with correctional facilities that incarcerate, for 72 hours or longer, persons accused or convicted of either a felony or two misdemeanors that occurred prior to or resulted in the current custody, are eligible to apply for SCAAP.

In FY 2002, the Department, in making difficult decisions about competing priorities, requested a reduction in funding for the State Criminal Alien Assistance Program (SCAAP) in order to fulfill its mission of supporting core law enforcement functions. As SCAAP reimburses states and local governments for criminal aliens already in custody, the Department believes it will have a greater impact on illegal immigration and violent crime by focusing resources on strengthening the Immigration and Naturalization Service (INS), expanding Federal prisons and detention facilities, and assisting Southwest Border prosecutors. The Department's request includes a $95 million increase for enhanced INS border enforcement, a $125 million increase for Federal detention facilities and services, and the $50 million in grant assistance to Southwest Border counties for detaining and prosecuting drug cases referred by U.S. Attorneys.

Although the 2002 SCAAP request of $265 million is less than the amount available in 2001, it still provides substantial resources for the costs of incarcerating certain categories of aliens convicted of state offenses. SCAAP is a payment program, not a grant program. Though payments made to States and localities are based on the proportion of correctional officers salaries attributed to guarding criminal aliens, state and local jurisdictions have great flexibility in their use.

2. **Airline and Cruise Ship Fees**

The budget request seeks an increase in the airport inspection fee and to initiate a cruise ship fee. For years, the Commerce, Justice, State Appropriations Subcommittee has tried to do this, but the two industries have strongly and successfully opposed the increases. How will the Department hire additional airport and seaport inspectors if these fees are not enacted?

Answer: The Immigration User Fee was last increased $1 from $5 to $6 in the Department of Justice Appropriations Act for 1994 (P.L. 103-121) dated October 1993. This has been the only fee increase instituted since the inception of the account in 1987. The current fee does not generate enough revenue to pay for the inspection mission. Therefore, the availability of any new positions or automation initiatives assumes passage of the 2002 budget language to increase the current fee by one dollar (from $6 to $7) for arriving international air passengers and institute a $3 fee in FY 2002 for those cruise ship passengers currently exempt.

3. **Land Border Inspectors**

The budget proposal calls for additional airport and seaport inspectors paid for by traveler fees, but it does not call for more *land* border inspectors? With the Border Patrol using successful operations like "Hold the Line," many aliens are forced to enter at land ports of entry. The land inspectors there are understaffed and overwhelmed by the Border Patrol's success. Don't you think additional land inspectors are needed?

Answer: The Service recognizes that there is a corresponding link between the National Border Patrol Strategy that is being implemented along the border between the ports-of-entry and the effects that have been seen at the land border ports-of-entry. As Border Patrol resources have increased in one area, the ports within those areas have seen a corresponding increase in the number of aliens referred to secondary inspection. The ports have also experienced an increase in document fraud, alien smuggling, and false oral claims to citizenship. The Department's FY 2002 request attempts to accommodate current workload needs along the border within the existing fiscal framework.

Answers to Follow-Up Questions to the Attorney General from Representative Jackson Lee

Violence against College Women

1. The National Institute of Justice has reported that based on the study findings, it is estimated that more than 350 rapes per year may occur on a campus with a population of 10,000 female students. How does the DOJ intend to address the serious problem of rapes and other violence against women on college campuses?

Answer: Violence against women on college and university campuses is a serious and widespread problem. The Grants to Reduce Violent Crimes Against Women on Campus Program was authorized under the Higher Education Amendments of 1998 and reauthorized in the Violence Against Women Act of 2000 to respond to sexual assault, domestic violence, dating violence, and stalking on campuses. The program is designed to encourage institutions of higher education to adopt comprehensive, coordinated responses to violent crimes against women on campuses. Toward that end, campuses develop partnerships with community-based victim advocacy organizations and local criminal justice or civil legal agencies to ensure victims' access to critical services, to hold offenders accountable, and to prevent violent crimes against women on campuses.

Current grantees, for example, train campus law enforcement to investigate sexual assault cases; grantees also provide counseling to sexual assault survivors. On some campuses, VAWO grants are used to train sexual assault nurse examiners who are then able to conduct specialized evidence collection in these cases. In addition, all grantees are required to provide to incoming students prevention and education programs about violence against women, including sexual assault. From Fiscal Year 1999, the first year the program received funding, through the end of Fiscal Year 2000, the Violence Against Women Office awarded 39 grants to institutions of higher education. The President's budget request for Fiscal Year 2002 includes a request for $10 million for this program, the amount authorized in the Violence Against Women Act of 2000.

To ensure that efforts funded under VAWA are properly targeted and most effective, in 1995, OJP's Bureau of Justice Statistics modified the National Crime Victimization Survey (NCVS) to improve the measurement of crimes against students, employees, and visitors occurring on college campuses. These modifications allow BJS to distinguish between crimes affecting college students that occur off-campus, and those that occur on-campus.

2. In FY2001, Congress appropriated $10.976 million for Grants to Reduce Violent Crimes Against Women on Campus. What is the DOJ's FY 2002 Request?

Answer: The Department of Justice, through the Violence Against Women Office (VAWO), awards grants, on a competitive basis, to colleges and universities to develop partnerships with nonprofit, nongovernmental victim advocacy organizations and local criminal

justice or civil legal agencies to enhance victim safety and offender accountability and to prevent crimes (including sexual assault, dating violence and stalking) against women. In FY 2002, $10 million is being requested for the Violence Against Women on Campus Program.

Grant funds may be used for the following statutory purposes:

- To provide personnel, training, technical assistance, data collection, and equipment for apprehending, investigating, and adjudicating persons committing violent crimes against women on campus.
- To train campus administrators, security personnel, and disciplinary or judicial board members to identify and respond more effectively to violent crimes against women on campus, including sexual assault, stalking, domestic violence, and dating violence.
- To implement and operate education programs for the prevention of violent crimes against women.
- To develop, enlarge, or strengthen support services programs, including medical or psychological counseling, for victims of sexual offense crimes.
- To create, disseminate, or otherwise provide assistance and information about victims' options on and off campus to bring disciplinary or other legal action, including assistance to victims in immigration matters.
- To develop and implement more effective campus policies, protocols, orders, and services devoted to preventing, identifying, and responding to violent crimes against women on campus, including sexual assault, stalking, domestic violence, and dating violence.
- To develop, install, or expand data collection and communication systems, including computerized systems linking campus security to local law enforcement for identifying and tracking arrests, protection orders, violations of protection orders, prosecutions, and convictions for violent crimes against women on campus, including sexual assault, stalking, domestic violence, and dating violence.
- To develop, enlarge, or strengthen victim services programs for campuses and to improve delivery of victim services on campus.
- To provide capital improvements (including improved lighting and communications facilities but excluding the construction of buildings) on campuses to address violent crimes against women, including sexual assault, stalking, domestic violence, and dating violence.

- To support improved coordination among campus administrators, campus security personnel, and local law enforcement to reduce violent crimes against women on campus.

Answers to Follow-Up Questions to the Attorney General from Representative Chabot

For FY 2001, the Civil Rights Division received funding for 8 new positions in the Voting Section. The Justice Department has informed Committee staff that one of those 8 positions will be the Senior Counsel tasked with examining voting reform issues and two other of those 8 positions will be attorneys who will directly support the Senior Counsel.

The Administration has requested for FY 2002 $391,000 and 5 new positions -- all attorneys -- to implement your Voting Rights Initiative. These additional resources would be dedicated to enforcing voting rights as well as to education and outreach to state and local governments on the issues of voting reform.

1. How will the remaining 5 new positions funded for FY 2001 be allocated in the Voting Section?

Answer: The 5 remaining attorney positions will be utilized to increase the Voting Section's allocation of resources to election monitoring, and where necessary to bring enforcement actions for election-related violations and other Voting Rights Act (VRA) claims. In last year's elections there were also a large number of election-day complaints raising registration problems related to the National Voter Registration Act (NVRA). Accordingly, the positions will enable us to focus increased resources on enforcement of the NVRA and providing guidance to state and local officials to achieve compliance.

2. How many of the 5 new positions funded for FY 2002 would be allocated to the Senior Counsel and how many would be allocated to the Voting Section?

Answer: The 5 attorney positions will be allocated to the Voting Section as follows:

	Pos.	FTE	Amount ($000)
Voting	5	2	$391
Observer and monitoring activities	2	1	156
Section 2 Litigation	3	1	235

A program increase of five attorney positions, two FTE workyears and $391,000 is being sought to provide the Section with sufficient resources to address the following: (1) the significant increase in election-related complaints received by the Section, and (2) the increased litigation capability necessary to enforce Section 2 of the VRA. This increase request is a result of an unprecedented number of election-related complaints that were made after the November, 2000 election. In addition, the Supreme Court's 2000 decision in Reno v. Bossier Parish School Board effectuated an important change in the Section's ability to root out illegal discrimination

through Section 5 enforcement, requiring that the Section bolster its Section 2 enforcement program to ensure adequate enforcement of the VRA.

Answers to Follow-Up Questions to the Attorney General from Representative Meehan

1. Last year, the U.S. Department of Justice's civil lawsuit against the tobacco industry was funded at approximately $23 million. The Department's tobacco litigation team say that they need $57.6 million for the coming fiscal year to proceed with discovery. And yet, this Administration has requested $1.8 million - a 90 percent cut from last year's funding.

You have noted that $1.8 million is what former Attorney General Reno requested for the lawsuit last year. But as you know, that funding was supplemented by over $20 million from HHS, the VA, the Defense Department, and the Justice Department's own Health Care Fraud and Abuse account.

If some in Congress once again try to kill this lawsuit by starvation, will you and this Administration stand up for America's kids and affirmatively fight for full funding -- $57.6 million -- for this lawsuit?

Answer: Funding requirements for the tobacco litigation will be determined by a number of factors including the Court's decisions on several pending motions and recommendations to the Attorney General from his subordinate senior managers. It should be noted that the Department of Justice's FY 2002 budget request is identical to its FY 2001 budget request. The FY 2001 budget request was silent on the level of reimbursements that would be sought to support the tobacco lawsuit. Reimbursements from other agencies were negotiated at the beginning of the current fiscal year. For FY 2002, the Department plans to use the same process to determine our funding needs based on our expectations at the beginning of FY 2002 and the requirements of the lawsuit.

Answers to Follow-Up Questions to the Attorney General from Representative Barr

1. "Project ChildSafe" is an OJP program. DOJ's budget request is for $75 million, annually for five years: $65 million per year in matching grants for gun safety locks, $10 million for a toll-free hotline to inform parents of the program. How was the requested amount actually calculated? [We understand there are only about 65 million handguns nationwide and that all new handguns are sold with locks. We understand further the locks sell for between $2.00 and $4.00.]

Answer: In developing its estimate of the cost of making available gun locks to all handgun owners, OJP considered gun locks ranging in cost from $1 to $100, and used in its calculations an average price of a trigger lock of $10.00. Under the proposed 50% matching funding arrangement for "Project ChildSafe," the federal and state governments would spend a combined total of $130 million per year over five years, thereby making available 65,000,000 trigger locks, enough for all handguns estimated to be currently circulating in the United States.

Answers to Follow-Up Questions to the Attorney General from Representative Hutchinson

1. Drug courts in operation around the country offer a unique and compassionate response to the thousands of low-level drug offenders who are in need of treatment. Congress has strongly supported drug courts and has increased funding for them in FY99 and FY01. For FY01, the Drug Courts Program Office estimates that it will spend $55 million and will have to turn away a large number of applicants. The President's FY02 budget proposes funding of $50 million. What is the administration's rationale for not providing the funding needed to meet the national demand for drug courts?

Answers: The Drug Courts Program Office (DCPO) has played an important role in the development and support of drug courts. The number of drug courts operating in the U.S. is increasing rapidly – from 30 or 40 in 1995, to 697 as of May 31, 2001. Of this total, DCPO funded implementation of 246 courts, and provided training (but not grant monies) to help another 141 drug courts get started. Yet another 370 courts are in the planning stages.

The President's Budget for FY 2002 requests $50.0 million (slightly above the level enacted in FY 2001), which will support 50 implementation awards and 15 enhancement awards to 65 drug courts as well as training workshops and technical assistance. In addition to DCPO funds, assistance for drug courts is available under the Juvenile Accountability Incentive Block Grant Program administered by the Office of Juvenile Justice and Delinquency Prevention, and the Byrne Formula Grant and the Local Law Enforcement Block Grant Programs administered by the Bureau of Justice Assistance. Also, assistance for drug courts is available under the Weed and Seed Program, administered by the Executive Office of Weed and Seed, and the Offender Re-entry Program, administered by the Corrections Program Office.

Thirty-two states have passed legislation supporting drug courts, and six others are introducing legislation, stimulating even more community interest in planning and operating drug courts. The drug court concept has also expanded to juvenile and family drug courts, DUI/DWI courts, and tribal courts. Approximately 100 new drug courts come on line each year, but less than half of these are established with Drug Court Program Office (DCPO) implementation funding. With such exponential growth, it would be unrealistic to expect federal monies to satisfy the funding needs of the entire nation's drug courts. In fact, the original goal of the Justice Department's grant program was to help get drug courts started, not to sustain them indefinitely.

Although DCPO has funded some type of drug court activity in each of the 50 states, all drug courts, even those that have received Drug Court Grants Program funding, rely upon multiple funding sources, including state and local funds, private grants, and federal funding from DOJ's Drug Court Grants Program, Byrne, Local Law Enforcement, and Juvenile Accountability Incentive block grant programs. All drug courts that initially receive federal assistance are encouraged to build a solid base of leveraged funds so that the court can continue

to operate once federal grant funds are no longer available.

To reduce drug abuse and crime effectively, the drug court approach must be fully integrated into traditional local and state court systems; and to become fully integrated, drug courts should be supported by state and local funding. OJP believes that the best way to strengthen the drug court system is to continue providing limited "start up" grants, while investing in a national program that offers comprehensive training and technical assistance program to each and every drug court. DCPO has developed high quality training and technical assistance. In the last two years, DCPO has conducted 100 workshops for approximately 6,000 practitioners, provided more than 15,000 incidences of technical support and assistance and has published 10 documents for the drug court field. Through the National Institute of Justice, DCPO is funding five separate national evaluations that are examining the impact of 25 drug courts. Results from this study, as well as performance data collected by drug court grantees, will provide valuable information on program results. Disseminating this information to the field through technical assistance and training is the best way to promote the efficiency, effectiveness, and long-term stability of the nation's drug courts.

Answers to Follow-Up Questions to the Attorney General from Representative Hostettler

1. What is the highest cost incurred by DOJ for prosecuting a FACE Act enforcement action? What is the lowest cost incurred? If there is a difference between civil and criminal enforcement in this regard, please provide appropriate details.

Answers: The Civil Rights Division's financial management system does not track expenditures on a case-by-case basis. The Division recently implemented an interactive case management system to allow us to track personnel time devoted to each respective case or matter.

Based on our best estimate, however, the most expensive civil FACE cases have been United States v. Operation Rescue National (Ohio) and United States v. Gregg (New Jersey). The ongoing criminal prosecution of James Kopp is currently the most labor intensive enforcement action brought under the FACE statute.

The least expensive FACE case was probably United States v. Burke (Kansas), where there was one defendant and relief was obtained within a few days of filing the complaint.

Because of civil discovery and motions practice, civil FACE cases are generally more expensive than criminal FACE cases. Civil pretrial preparation involves extensive discovery and routinely includes numerous depositions all over the country. Significant time is spent on discovery motions as well as dispositive motions, and civil trials have lasted from two days to two weeks. In addition, civil FACE cases typically involve more defendants than criminal cases. One of the Division's civil cases, United States v. Roach (Pennsylvania) included 35 defendants, and the Gregg case included 30.

2. What amount of the Civil Rights Division's budget is spent on enforcement of the Freedom of Access to Clinic Entrances Act?

Answers: Total FY 2001 costs are projected to be $495,000.

House Committee on the Judiciary
Question for the Hearing Record Relating to
General Issues Concerning the
Oversight Hearing of the Department of Justice
June 6, 2001

1. On May 17, 2001, the Committee wrote the Attorney General urging him to "expeditiously consider and bring to resolution the whistleblower case filed by Mr. Martin E. Anderson." The Committee understands that the Department is engaged in final negotiations with the Office of Special Counsel (OSC) regarding this case. The Committee also understands that a final obstacle to the resolution of this matter is the OSC press release announcing the settlement and the award to Mr. Anderson of the OSC's Public Servant Award.

Is the OSC press release an obstacle to resolving the Anderson case? Is the Department negotiating or has the Department negotiated the terms or language of any OSC press release relating to Mr. Anderson or his case? If so, who are the DOJ officials negotiating such terms or language and who authorized such negotiation?

Answer: The matter referenced above has been resolved. The settlement agreement was signed on Friday, June 15, 2001 and the settlement check has been delivered to Mr. Andersen.

2. The Department of Justice has two national drug intelligence centers under its jurisdiction. The first is the National Drug Intelligence Center (NDIC), located in Johnstown, Pennsylvania, which was established in 1993 and is designated as the nation's principal center for strategic domestic counterdrug intelligence. The other is the El Paso Intelligence Center (EPIC), located in El Paso, Texas, which is funded by the Drug Enforcement Administration and was established in 1974. EPIC is a national law enforcement intelligence center whose primary focus is illegal drugs and immigration violations.

a) To what extent do the responsibilities of these two intelligence centers overlap?

ANSWER: Similar concerns have been raised in the past. The Treasury and General Government Appropriations Act of 1998, called for a study of the national counterdrug intelligence architecture and the 1998 Intelligence Authorization Act required a review of the National Drug Intelligence Center (NDIC). In September 1997, a review of the U.S. counterdrug intelligence center and activities was commissioned by the Attorney General, the Director of Central Intelligence, the Secretary of Treasury and the Director of National Drug Control Policy, and supported by the Secretaries of Defense, Transportation and State. Consequently, in February 2000, the completed Study – the General Counterdrug Intelligence Plan (GCIP) - was approved by eight heads of the aforementioned Departments and President Clinton.

The GCIP outlined a series of 73 concrete action items, grouped into discrete sections, under six general topic areas that address: National Counterdrug Intelligence Coordination; National Centers; Regional, State and Local Cooperation; Foreign Coordination; Analytic Personnel Development and Training; and Information Technology.

The National Centers Section outlined steps to improve coordination and eliminate unnecessary duplication among the four National Centers. Specifically, the National Drug Intelligence Center was established as the principal center for domestic, strategic counterdrug analysis in support of policy makers and resource planners. The El Paso Intelligence Center (EPIC) was strengthened as the principal center for operational and investigative analysis of illicit drug movements in support of interdiction activities and U. S. law enforcement.

The GCIP also established the Counterdrug Intelligence Coordinating Group (CDICG); an interagency group comprised of 13 members representing Departments and Agencies with counterdrug law enforcement and intelligence responsibilities. The CDICG is charged with monitoring implementation of the GCIP.

b) Would our nation's law enforcement intelligence needs be better served by combining these two centers?

ANSWER: No, the two Centers have distinct and differing responsibilities. NDIC's mission is to provide policymakers at both the National and the State and Local level with timely narcotic threat assessments, to facilitate informed decisions regarding the utilization of scarce counterdrug resources. These assessments include both demand and supply information and, in order to ensure the widest distribution practical, generally are at the unclassified level. EPIC provides law enforcement agencies at all levels with operational intelligence in order to enhance or expand investigative activities. In most cases, EPIC's information is law enforcement sensitive.

NDIC is an autonomous agency within the Department of Justice. This status is conducive to its mission to provide timely, objective analyses to policy makers. EPIC, while a multi-agency operation, remains under the line authority of the Drug Enforcement Administration (DEA). This, too, is appropriate, given DEA's status as the lead federal narcotic law enforcement agency. Combining the two Centers would, in fact, be counter productive to both missions.

i) By having two separate intelligence centers on either side of the country, don't we run the risk of failing to maximize our intelligence efforts through a possible communications breakdown between the two centers?

ANSWER: No, as related above, the Centers have distinct and differing missions and responsibilities. Nonetheless, the GCIP promotes enhanced connectivity and cooperation among

all the Centers and counterdrug law enforcement agencies. In furtherance of that goal, NDIC has installed video teleconferencing systems in EPIC, DEA, FBI and the RISS Centers. An additional system is in the process of being installed in the Coast Guard Intelligence Center at Suitland, MD. Additionally, NDIC has detailed intelligence analysts to EPIC, DEA, and FBI.

NDIC also assigns intelligence analysts to long term temporary duty with DEA and FBI field offices and HIDTA centers to promote timely communications and exchange of intelligence. Both EPIC and NDIC are staffed by detailees from a variety of law enforcement and intelligence agencies, including the Central Intelligence Agency, FBI, U. S. Customs, U. S. Cost Guard, U. S. Marshal Service, Bureau of Prisons, Alcohol, Tobacco and Firearms and others. In furtherance of their distinct missions, both EPIC and NDIC also promote strong relationships among the State and Local law enforcement community. EPIC is in the process of establishing a local law enforcement advisory committee to ensure that state and local needs are addressed and communications are established. Similarly, NDIC has established a Field Program Specialist program to network NDIC with law enforcement agencies throughout the country to improve the collection of information.

Finally, both EPIC and NDIC utilize a variety of sophisticated communications system to ensure appropriate coordination and liaison.

c) With the DEA, the FBI, and other Federal law enforcement agencies each having their own separate intelligence divisions with hundreds of intelligence analysts on staff, is their really still a need for these two national drug intelligence centers?

ANSWER: Yes, the intelligence analysts assigned to the FBI, DEA and other federal agencies have specific responsibilities, generally in support of ongoing investigations. The NDIC, as previously mentioned, fills a distinct need for the preparation of counterdrug threat assessments. These assessments are designed not only for the federal community, but also for state and local policy makers. Similarly, EPIC provides investigative support to agencies throughout the United States. The intelligence analysts assigned to NDIC and EPIC ensure that relevant information is processed at the appropriate center, depending on the purpose of the analysis. Eliminating the Centers would increase the burden on the FBI, DEA and other counter narcotic law enforcement agencies, making it more difficult to provide intelligence support to specific, ongoing investigations.

3. The President issued a Statement on May 8, 2001 which appeared to place primary anti-terrorism responsibility with the Federal Emergency Management Agency rather than with the FBI at the Justice Department. While FEMA is not a law enforcement agency and is without experience in crisis management, this may impede the efforts of the FBI's National Domestic Preparedness Office, which currently coordinates a comprehensive response to potential terrorist attacks in America.

a) Was the Attorney General consulted by the National Security Counsel or the

White House prior to the President's statement?

ANSWER: The Department does not comment on the Attorney General's consultations with the President or the White House.

b) Was the Department's Terrorism and Violent Crime Section consulted prior to the statement?

ANSWER: The Department does not comment on the component's consultations with the President or the White House.

c) Was the Director of the FBI, or the National Domestic Preparedness Office consulted?

ANSWER: The Department does not comment on the Director's consultations with the President or the White House.

4. The Committee has received the Department's report: The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review, June 6, 2001. It noted that subsequent to the September 12, 2000, report, the Department identified additional information concerning cases in U.S. Attorney offices "in which the facts would have supported a capital charge, but which were not charged as capital crimes and submitted to the departmental review procedure."

a) Please provide the Committee with a breakdown, by District, of all such cases, as well as the explanation of why the U.S. Attorney did not seek the death sentence in those cases.

ANSWER: The supplementary data submitted by the U.S. attorney offices included "A" data and "C" data. The "A" data was data on 231 cases (beyond the 682 submitted to the review procedure) that the offices provided in response to a directive to submit information concerning: (1) any cases that should have been, but were not, submitted to the capital case review procedure, (2) cases exempted from submission because the defendant pled to a noncapital offense, and (3) cases that could have been brought as death eligible cases but were not. When added to the 682 defendants in submitted cases, the "A" data produced a broader class of 913 defendants who were 17% (158) White, 42% (387) Black, 37% (334) Hispanic, and 4% (34) "Other." The "C" data was data on additional cases which, according to the districts, had gone or were going through the review process, or involved fugitives. Adding the "C" cases as well as the "A" cases produces a universe of 973 defendants in potential capital cases. Attachment A to these responses provides a breakdown by district.

The reasons for decisions to pursue or not pursue capital charges or sentences were discussed at length in the June 6, 2001 report. Potential capital cases involving Black or Hispanic defendants were less likely to result in capital charges and submission of the case to the

review procedure. Specifically, capital charges were brought and the case was submitted for review for 81% of the White defendants; the corresponding figures for Black defendants and Hispanic defendants were 79% and 56% respectively. Considering the process as a whole, in potential capital cases, the Attorney General ultimately decided to seek the death penalty for 27% of the White defendants, 17% of the Black defendants, and 9% of the Hispanic defendants. Likewise, considering the actions of the U.S. Attorney offices, they exercised their various powers with greater frequency in potential capital cases to avoid death penalty prosecutions of minority defendants. Specifically, their actions resulted in non-capital treatment for 74% of the White defendants, 81% of the Black defendants, and 86% of the Hispanic defendants. See June 6, 2001 report at 13 & nn.12-13, 24 & nn.18-19. These figures, as well as other information and analysis set forth in Parts II and III of the June 6, 2001 report, indicate that federal death penalty decisions have not involved bias against racial or ethnic minorities.

b) The Department's revised protocol requiring U.S. Attorneys to submit a death penalty evaluation form in all cases charging a capital offense or conduct that could be charged as a capital offense and to set forth the reasons for not seeking the death penalty is a step in the right direction. Do you believe that is sufficient to assure the American people that in this administration U.S. Attorneys throughout the country will bring all appropriate capital cases and will seek the death penalty in all appropriate instances?

ANSWER: Since 1995, the Department's procedures have required U.S. Attorneys to submit for review, and for a decision by the Attorney General about whether to seek the death penalty, all cases involving charges of crimes legally punishable by death, regardless of whether the U.S. Attorney recommended seeking the death penalty. The recent changes in the protocol broaden the centralized review process in two significant ways: First, as noted in the question, U. S. Attorneys will be required to submit cases involving conduct which could be charged as a capital crime, regardless of whether the U.S. Attorney wishes to bring a capital charge. Second, once the Attorney General has decided to seek the death penalty in a case, the approval of the Attorney General will be required for any subsequent plea agreement that would result in not seeking a capital sentence. We believe that these changes in the protocol will be an effective means of ensuring that the death penalty is sought in all appropriate cases.

5. Between Fiscal Year 1993 and Fiscal Year 2000, the Department has only prosecuted 5 cases under 18 U.S.C. Sec. 2257, which requires producers of sexually explicit materials to keep certain records to ensure that they do not use underage people in such productions. Furthermore, the Department admits that there is no regular inspection of such records as the regulations promulgated under the first Bush Administration permit. See Letter from Sheryl L. Walter, Acting Assistant Attorney General, to the Honorable F. James Sensenbrenner, Jr. What will the Department do, if anything, to reinvigorate the statute and accompanying regulations?

ANSWER: The FBI is not a regulatory agency and has no responsibility nor mandate to routinely inspect records for compliance with the requirements of this statute. We do however, have a responsibility to respond to and investigate alleged violations of the statute just as we do relative to violations of other Federal statutes for which we have primary investigative jurisdiction.

Questions Submitted By Ranking Member Conyers

1. In your testimony you stated that you had recused yourself from the Torricelli matter, could you state the basis for this recusal and the date it became effective.

ANSWER: Please see letter to Chairman Sensenbrenner from Attorney General Ashcroft dated June 21, 2001.

2. Please describe any and all substantive contacts (e.g. any contact that involves discussion of the case beyond your indication of recusal) you have had with the President or Vice-President, any member of the White House staff, any Republican member of the Senate or his or her staff, a senatorial candidate, or any official or employee of the Republican National Committee or the Republican Senatorial Campaign Committee about the Torricelli matter.

ANSWER: Please see letter to Chairman Sensenbrenner from Attorney General Ashcroft dated June 21, 2001.

3. Please specify the dates of these contacts.

ANSWER: Please see letter to Chairman Sensenbrenner from Attorney General Ashcroft dated June 21, 2001.

If, because of your recusal, you are unable to answer any of the following questions, please refer them to the appropriate member of your staff for a prompt response (and provide me the name of such person).

4. Please describe any and all contacts the Justice Department staff has had with the President or Vice-President, any member of the White House staff, any Republican member of the Senate or his or her staff, senatorial candidate or any official or employee of the Republican National Committee or Republican Senatorial Campaign Committee regarding the Torricelli matter.

ANSWER: As you are aware, the Department has specific rules with regard to communications with the White House, Congress, and the public on pending criminal matters. In this case, we have discovered no instances of the type of communications specified in your questions.

5. Please specify the dates of these contacts.

ANSWER: See answer to question number 4 above.

6. Has anyone else on the Justice Department staff been recused?

ANSWER: Please see letter to Chairman Sensenbrenner from Attorney General Ashcroft dated June 21, 2001. In addition, the United States Attorney's Office in New Jersey, an Acting Associate Attorney General, and the Assistant Attorney General, Criminal Division have been recused from this investigation.

7. For each person recused, please provide a written confirmation of the recusal, its effective date, its terms and its basis.

ANSWER: See answers to question 6. The Assistant Attorney General was recused upon assuming office because of his representation of a witness while in private practice. The United States Attorney's Office in New Jersey was recused because certain persons in that office were candidates for a federal appointment in that state. The Acting Associate Attorney General was recused based on personal and professional relationships which predate the time he joined the Department of Justice.

8. Please provide a complete list of persons at Main Justice with whom US Attorney Mary Jo White has had any contact regarding the Torricelli matter since January 21st 2001.

ANSWER: United States Attorney Mary Jo White has had contact with the following individuals at Main Justice regarding the Torricelli matter: Robert Mueller, Jack Keeney, David Margolis, Michael Horowitz, and Dan Levin.

9. What is your present understanding as to when Ms. White will depart the employ of the Justice Department?

ANSWER: See the answer to Question 10.

10. Have you or anyone in the Department had any discussions with her regarding her departure?

ANSWER: The only person who spoke to Ms. White on the subject of her departure was Mark Calloway, former Director of the Executive Office for United States Attorney (EOUSA), who was responsible for advising all of the United States Attorneys of their status. Mr. Calloway told Ms. White that she could serve until her successor was nominated and confirmed.

11. Please describe and list the dates of such discussions.

ANSWER: Mr. Calloway spoke to Ms. White on approximately March 14, 2001.

12. Have you or anyone at Main Justice either directly or through intermediaries in any way suggested any preference as to her departure date?

ANSWER: Assuming this question relates to anyone directly or indirectly suggesting a preferred departure date to USA White, the answer is: No one has spoken to Ms. White other than Mr. Calloway, as set forth in the response to number 10.

13. If so, please describe and list the dates of such discussions.

ANSWER: See answer to number 12.

14. Are you aware of press reports relating to grand jury matters pertaining to Senator Torricelli matter?

ANSWER: We are aware of numerous press reports concerning the ongoing investigation involving Senator Torricelli and we fully share your concern about any possible leaks in this matter. As you may know, however, the United States District Court in New Jersey recently found that Senator Torricelli had not established that law enforcement personnel were the source of any grand jury information reported in the press. Further, Senator Torricelli's lawyers have now conceded that the one press comment concerning the investigation that was made by a Department official at the request of the Senator's attorney, and about which the Court had requested further briefing, was neither illegal nor improper. The Court found that the grand jury information was at least as likely -- and in most instances more likely -- to have been disclosed by witnesses, their attorneys, and other people who are not bound by the rule of grand jury secrecy applicable to law enforcement personnel. The Court recently made the same finding with respect to a similar motion filed by a former employee of Senator Torricelli's campaign committee.

Nonetheless, whenever allegations of inappropriate disclosure of confidential law enforcement information are made (whether grand jury information or not), it is a matter of utmost concern to the Department. For example: the prosecutors responsible for this matter had referred for review by the Department's Office of Professional Responsibility (OPR) a number of news articles that contained non-grand jury information related to the investigation. The Department has also taken other actions, which we cannot disclose at this time, to determine whether there have been any improper law enforcement leaks. If the Department is able to determine that law enforcement personnel were responsible for any improper disclosures of information, and is able to identify the source of any such disclosures, we can assure you that appropriate steps will be taken to address that misconduct.

15. Are you aware of the May 27 New York Post article "Torch is Toast" in which a Justice Department investigator is quoted as saying that the Justice Department is going to

indict Torricelli?

ANSWER: See answers to number 14 and 17.

16. Does this leak, if it in fact originated from a Justice Department investigator, violate Rule 6(e) of the Federal Rules of Criminal Procedure?

ANSWER: See answer to number 14 above. At this early stage of OPR's review, it is not possible to draw any firm conclusion on that question.

17. Does this leak, if it in fact originated from a Justice Department investigator, violate the Department's ethics guidelines or the model rules of professional conduct?

ANSWER: That is one of the articles OPR is reviewing in order to determine what further action is warranted. However, at this early stage of OPR's review, it is not possible to draw any firm conclusion on your question.

If OPR found that a Department of Justice attorney disclosed information about the Torricelli investigation to the news media, depending on the circumstances, it could conclude that the attorney violated his or her obligations under state bar association rules of professional conduct, Department regulations, or the rules governing grand jury secrecy. The American Bar Association's Model Rules of Professional Conduct are not binding on attorneys employed at the Department or elsewhere, though most state bar associations have adopted the rules with some modification, and those rules do bind the attorneys who are subject to them.

18. Do you believe that these reports were false or do you believe these reports were the results of leaks from the Department of Justice?

ANSWER: We are unable to draw any conclusions at this early stage of the review.

19. Are you aware of past Department of Justice practice with respect to investigating leaks with particular reference to the investigation under the Bush Administration by Attorney General Dick Thornburgh which promptly investigated leaks relating to a matter involving a sitting member of Congress which resulted in the dismissal of the responsible parties?

ANSWER: While we cannot be certain, we believe that we have identified the investigation to which your question refers. However, as best we can determine, no one was dismissed or otherwise disciplined as a result of the investigation in that matter.

20. Has the Department of Justice initiated a probe of the leaks involving the Torricelli matter?

ANSWER: OPR has initiated a review of possible unauthorized disclosures of information relating to the Torricelli investigation concerning a number of newspaper articles that have been referred to it. See also answer to question 14

21. If not, why not?

ANSWER: See answer to number 20.

22. If so, please list specific actions that have been taken to determine the source of the leaks, the dates of such actions and any results obtained.

ANSWER: OPR's review of the matters referred to is ongoing. See also answer to question 14

23. If you conduct or are conducting such an investigation will you make it available to the Committee members or public?

ANSWER: In accordance with established procedures, OPR is conducting a review to determine whether an investigation is warranted. At the conclusion of any Department of Justice administrative proceeding on this matter, we would be pleased to discuss this issue with the Committee. We should also note that in certain cases of significant public interest, a summary of an OPR investigation may be made available to the public.

24. Do you believe that such leaks have the potential to tarnish the due process guarantees rights of Senator Torricelli?

ANSWER: See answer to question 14 above.

25. Are you aware of any prosecution that the Department has previously undertaken against a federal candidate or campaign staff for the spending of soft money?

ANSWER: No.

26. Are you aware specifically of any previous prosecution directed against a federal candidate's or campaign's direction or coordination of the spending of soft money through state or local party committees?

ANSWER: No.

27. Do you believe that a Republican appointee in the Bush Department of Justice should retain responsibility for a charging decision in a case such as this, where control of the United States Senate could be affected and there is clear danger of public perception of partisan motivation or advantage?

ANSWER: Acting Attorney General Thompson has concluded that utilization of the Special Counsel Regulations would not be appropriate in this case. The Department of Justice has a long history of evenhanded, professional handling of investigations involving Members of Congress of both parties. Any charge that the traditional work of the Department's career prosecutors might be colored by which political party is in the majority in the Senate is simply wrong. Furthermore, in this case, several Departmental officials have recused themselves from any participation in this case. Deputy Assistant Attorney General John C. Keeney, a veteran official in the Criminal Division, is serving as Acting Assistant Attorney General. The investigation in question began under the previous Administration and is being continued under the direct supervision of a United States Attorney appointed by that Administration. Career prosecutors are handling the matter. Given these circumstances, the Acting Attorney General is confident that the public will have no grounds for concern that politics will play any role whatsoever in any decision made in this case.

Gun Safety

28. In response to a question from Congressman Schiff, you indicated that you considered Roe V. Wade "settled law" and the "law of the land". Would you also characterize the Supreme Court's decision in *United States v. Miller*, 307 US 174 (1939) "law of the land"?

ANSWER: Yes.

29. Do you believe *Miller* to be settled law, and if not, why not?

ANSWER: Yes.

30. At the NRA's Annual Meeting in Kansas City last month, the organization's chief lobbyist, James Jay Baker, gave a speech, which also appears on the NRA web page and which states in part, "Attorney General Ashcroft has also vowed to put the 'instant' back in instant check and run the system as Congress intended so that only criminals, not honest citizens, are denied guns. A top-to-bottom review of the National Instant Check System (NICS) is underway right now." Is it in fact true that the Department of Justice is conducting a top-to-bottom review of the National Instant Check System?

ANSWER: As stated in the May 4, 2001, notice of delay of effective date of the NICS regulation, Department officials conducted a review of issues regarding availability of state records, response procedures, audit requirements, and other considerations in an effort to improve the performance and integrity of the NICS system. 66 Fed. Reg. 22898. On July 6, 2001, the Department published a Notice of Proposed Rulemaking that contained five separate provisions to improve the capacity of the NICS system to ensure instant checks are reliable, valid and workable. 66 Fed. Reg. 35567.

31. If so, what is the process for this review and what substantive issues will be reviewed? Who at the Department is engaged in the review?

ANSWER: Consistent with longstanding practice, the Department of Justice does not disclose pre-decisional materials or information regarding internal deliberations.

32. What do you think Mr. Baker meant when he said that you "vowed to put the 'instant' back in instant check"?

ANSWER: We would not attempt to guess what another person, not speaking on the Department's behalf, means by a particular statement.

33. When and how was the NRA made aware that you intend to undertake a top-to-bottom review of the National Instant Check System?

ANSWER: In accordance with the memorandum of January 20, 2001, from the Assistant to the President and Chief of Staff, entitled ``Regulatory Review Plan,'' published in the Federal Register on January 24, 2001 (66 FR 7702), the Department of Justice temporarily delayed for 60 days (66 FR 12854) the effective date of the final rule entitled ``National Instant Criminal Background Check System Regulation'' (66 FR 12854, March 1, 2001), originally published in the Federal Register on January 22, 2001 (66 FR 6470). On May 4, 2001 (66 FR 22898) the effective date was delayed for an additional 60 days. The final rule went into effect on July 3, 2001, per the May 4th Federal Register notice. (66 FR 22898).

34. Please specify all contacts as well as the nature of contacts you or your staff have had with the National Rifle Association since January 21, 2001.

ANSWER: As head of the Department of Justice, the Attorney General has met and will continue to meet with a wide variety of individuals and organizations. Staff members at the Department have continuous contact with state and local government, law enforcement, and many other groups and organizations, to ensure that the Department's policies and positions on a variety of issues are clearly communicated to these groups.

35. Have you informed anyone else, for example, members of Congress or other interest groups, that you intend to conduct a top-to-bottom review of the National Instant Check System?

ANSWER: As was stated above, notice of delay of effective date of the NICS final rule was published in the Federal Register on March 1, 2001, and on May 4, 2001. That notice specified that the Department was reviewing issues relating to audit requirements, privacy interests, and other considerations in an effort to improve the performance and integrity of the NICS system. 66 Fed. Reg. 22898.

36. What is the anticipated end-product of this review?

ANSWER: The review is ongoing, in light of the notice of proposed rulemaking published on July 6, 2001 (66 FR 35567) and the public comments on that proposal. The notice of proposed rulemaking contains five proposals to make additional changes in the NICS regulations. The proposed changes balance the legitimate privacy interests of law-abiding firearms purchasers and the Department's obligation to enforce the Brady Act and the Gun Control Act to prevent prohibited persons from purchasing firearms.

37. Significant criticism was leveled at the previous Administration for its supposed failure to prosecute people who had lied on the federal forms required for the Brady background check. What kind of resources do you intend to devote to prosecute felons and other prohibited persons who lie on the Brady Background check forms?

ANSWER: This Administration has dedicated $233.6 million this fiscal year, and will request an additional $325.2 million next fiscal year, for a comprehensive gun law enforcement strategy called Project Safe Neighborhoods. The emphasis of this initiative is vigorous enforcement of all gun laws, including the prosecution of felons and other prohibited persons who lie on the Brady background form.

38. How many prosecutions have been initiated for lying on the forms since January 20, 2001?

ANSWER: No accurate federal statistics have been yet assembled to specifically answer your query. However, all United States Attorneys have been directed to focus their efforts on the prosecution of federal firearms violations. The vast majority of these cases are prosecuted under two specific sections of the code (18 U.S.C. § 922(a)(6) and 18 U.S.C. § 924(a)(1)(A)). FY 2001 data, including those cases filed since President Bush took office, is currently being compiled, and we would be happy to provide it to the Committee when it becomes available.

39. How high of a priority are such prosecutions for the Department of Justice and the US Attorneys and what directives have you forwarded to reflect such a prioritization?

ANSWER: One of the Department's top priorities is reducing the incidence of gun violence by aggressively enforcing existing gun laws. Through Project Safe Neighborhoods, the Attorney General will direct United States Attorneys to devote all available resources to prosecute persons who violate the gun laws, specifically those persons who attempt to subvert the legitimate gun crime prevention objectives of the Brady Act by falsifying information on the Brady background form.

On June 28, 2001, the Attorney General announced a comprehensive initiative to reduce gun crime through the enforcement of federal gun laws. The centerpiece of that announcement was a directive to all U.S. Attorneys to prosecute to the fullest extent practicable persons who

attempt to purchase guns illegally. To provide prosecutors with the tools they need, the Department of Justice targeted 113 new prosecutors in the areas with the highest levels of gun crime. In some areas, this will double or triple the number of federal prosecutors devoted to gun crimes.

40. The FBI has determined that in order to ensure the effectiveness of NICS, it is essential to maintain an audit log. The Department of Justice has described the purpose of the audit log:

ANSWER: No question to be answered.

41. The audit log enables the FBI to monitor the use of the NICS by firearms dealers, states serving as points of contact, and FBI personnel. The FBI also examines whether the FBI employees and contractors are making correct determinations as to whether potential transferees are disqualified, to ensure that "proceed" responses are not being supplied with regard to persons who are disqualified. Decisions to allow a firearm purchase are not fully automated, and thus officials must review and evaluate records before making a decision. Review of decisions made by NICS examiners is necessary to ensure that responsible individuals make correct decisions on whether a transfer is permissible, and to enable supervisors to provide additional training where necessary.

ANSWER: No question to be answered.

42. The FBI has determined that records from NICS should be kept for ninety days to guarantee that the NICS is functioning. Do you agree that the audit log is essential to ensuring the effectiveness of the NICS?

ANSWER: Pursuant to the Brady Act, the Attorney General is required to prescribe regulations to safeguard the privacy and security of the sensitive information checked by the system and ensure that the system is operating in the manner required by the Brady Act. The NICS Audit Log, created by regulation, is a valuable tool to ensure the privacy and security of the information in the system, as well as to protect the system from misuse. Under the notice of proposed rulemaking published by the Department on July 6, 2001, the NICS Audit Log is maintained and the retention period for information on approved transactions is reduced to no longer than prior to the beginning of the next business day after the decision is communicated to the Federal Firearms Licencee requesting the background check. 66 FR 35567.

43. On at least three separate occasions, you voted for amendments to kill the FBI Audit Log by requiring the immediate destruction of NICS records relating to approved transfers. When Senator Schumer asked you about your votes and your commitment to safeguarding the integrity of NICS by preserving an audit log, your non-committal response was that you will be "law-oriented". Reading this answer, the Congressional Quarterly Daily Monitor wrote that "the National Rifle Association and its allies can take

heart from a response [you] gave in written testimony last month that gives [you] room to move on one of their top priorities: the immediate destruction of the paperwork collected as part of instant background checks on gun buyers." You were again urged to preserve the NICS Audit Log in a letter sent to you by Representative Carolyn McCarthy of New York and Representative Frank, and 15 other House Members. My understanding is that you have not responded to the letter. However, you have now delayed the implementation of a final Department of Justice Regulation that was to have gone into effect in early March, and your statements in the Federal Register about the delay as well as those of your spokespersons in the press suggest strongly that you are reconsidering this rule with a view to requiring immediate destruction of information in the Audit Log. In your statements in the Federal Register, you have stated that you have good cause to delay the final regulation. Can you explain to the Committee what your legal authority is to delay a final regulation of the Justice Department?

ANSWER: The Final Rule on the NICS System was approved in January and had an effective date of March 5, 2001. *See* 66 Fed. Reg. 6470. In response to the memorandum from White House Chief of Staff Andrew Card on January 20, 2001, which directed agencies to postpone for 60 days the effective date of all final rules that had already been published but had not yet taken effect, the effective date of the NICS rule was postponed from March 5 to May 4, 2001. *See* 66 Fed. Reg. 12854. The Department issued a further 60-day postponement of the effective date, from May 4 to July 3. *See* 66 Fed. Reg. 22898.

In both cases, the delay of effective date was premised on the need for Department officials to review the rule and the record in light of issues that had been raised. Both postponements were for a limited 60-day period, not an open-ended deferral of the NICS rule. The second action, delaying the effective date until July 3, noted that there would be no further delays in the effective date without a notice-and-comment rulemaking on the question of such delay.

The legal authority for these actions, pursuant to the Administrative Procedure Act (APA), was stated in the supplementary information for both actions. Because the Final Rule had not yet gone into effect, the delay of effective date was exempt from notice and comment because it constitutes a rule of procedure under 5 U.S.C. § 553(b)(A). Alternatively, the implementation of the action without prior notice and comment, effective immediately upon publication, was based on the good cause exceptions of the APA. Those exceptions, found in § 553(b)(B) and (d)(3), allow an agency to forgo notice-and-comment procedures, and to forgo the usual 30-day delay in the effective date of a substantive rule, if the agency makes a finding of good cause that is published with the rule. In view of the findings which were published in connection with each action ordering a limited delay in the effective date, the Department satisfied the legal requirements for rulemaking under the APA.

44. Isn't it true that information in the Audit Log would be destroyed in 90 days under the Final Rule that you have delayed, and that the information contains no information

about the type of gun that is purchased or even whether the purchaser actually completed the transaction?

ANSWER: The above statement is true regarding the retention period and information on completion of sale. The NICS audit log may keep information on the type of transactions, i.e. long gun or handgun, involved in each check. The 90-day retention period for approved transactions went into effect on July 3, 2001, as stated in the Federal Register notice of May 4, 2001.

45. Therefore, what is the nature of the privacy concern that you have identified?

ANSWER: The audit log that would be destroyed before the beginning of the next business day contains information only on those transactions that were allowed. NICS would retain a transaction number and date of inquiry to provide oversight information for the FBI. The information that would be destroyed would contain such personal information as the person's name, address, date of birth, and other identifying information, including possibly the person's social security number. There is no reason to keep such personal information once the transaction has been allowed. Indeed, the Brady Act, § 103(h), 107 Stat.1542, specifically directs the Attorney General to issue regulations "to ensure the privacy and security of the information of the [NICS]."

46. Also, didn't the Justice Department extensively look at this issue over a period of several years in formulating the regulation that has been delayed?

ANSWER: The Attorney General cannot speak to events that occurred prior to his appointment and confirmation.

47. Didn't DOJ's own internal auditors—the FBI—state in no uncertain terms that 90 days was the bare minimum period of time that was necessary for an Audit Log and an immediate destruction requirement would require substantial reconfiguration of the NICS?

ANSWER: It is the Attorney General's understanding that immediate destruction would require some reconfiguration of the NICS system, but that destruction prior to the beginning of the next business day would not require substantial reconfiguration. The Notice of Proposed Rulemaking, published on July 6, 2001, recommends prompt destruction of information on approved transaction; specifically, "prior to the start of the next business day following the date on which the 'proceed' message was received by the initiator of the NICS check." 66 Fed. Reg. 35567.

The FBI has not stated to the Attorney General in no uncertain terms that 90 days was the bare minimum period of time that was necessary for an Audit Log.

48. In delaying the NICS Rule, who did you consult with in the Department and the FBI? Did any career officials who have worked on NICS implementation disagree with your decision to delay the implementation date of the final regulation?

ANSWER: Consistent with longstanding practice, the Department of Justice does not disclose pre-decisional materials or information regarding internal deliberations.

49. If so, please identify the nature of such disagreement.

ANSWER: Consistent with longstanding practice, the Department of Justice does not disclose pre-decisional materials or information regarding internal deliberations.

50. Representative Joel Hefley has introduced H.R. 1460, the Second Amendment Rights Protection Act of 2001. This legislation would require immediate destruction of NICS records of approved sales. In the past, DOJ has consistently opposed such legislation.

ANSWER: No question to be answered.

51. Can you assure us that you will oppose this legislation and a similar bill introduced in the Senate by Senator Enzi?

ANSWER: This is a matter of policy about which the Attorney General would confer with officials at the Justice Department and with the President of the United States in arriving at a decision.

52. Do you believe that the Second Amendment prevents government from keeping such limited information on gun buyers?

ANSWER: No.

53. The NICS is administered by the FBI. The Department of Justice has determined that 95% of background checks are completed within two hours; the Department of Justice has determined that of the remaining 5%, "22% of all gun buyers who are found to be prohibited persons are not found to be prohibited until more than 72 hours have passed." The FBI has estimated that under a 24-hour time frame, more than 17,000 people who had been stopped would have been sold firearms. Given the state of the NICS, as described by the FBI, what is your position on decreasing the amount of time mandated to complete problematic background checks from the currently mandated 3 business days to 24 hours?

ANSWER: As the Attorney General stated at his confirmation hearing, the Department of Justice will vigorously defend federal gun control statutes passed by Congress whenever there is a good-faith and conscientious basis for doing so.

54. Since the people whose checks take the longest are significantly (up to 20 times) more likely to be prohibited, why shouldn't law enforcement have all the time it needs to finish a check when there is a question?

ANSWER: The Brady Act states that a firearm can be transferred to an individual after three days if the FBI/NICS has not indicated by that time that the transfer is prohibited. The Department will enforce the Brady Act as passed by Congress.

55. On March 30, 2001, USA Today reported, "The nation's system for doing instant background checks on gun buyers is being undermined by fragmented computer systems and antiquated criminal records in courthouses across the country. Authorities say the flaws could be allowing thousands of felons to buy guns illegally each year. During the system's first two years, the FBI estimates, there were as many as 200,000 gun sales to felons and others who are [legally] barred from owning guns. The reason: Incomplete or missing criminal records kept background checks from being done within three business days, as required by U.S. law." Recent experience in Arizona confirms the problems highlighted in the USA Today story. The Arizona Auditor General's Office, in a report released in May 2001, indicated that a third of 5,000 gun purchases made in 2000 should not have happened because of "serious disqualifying offenses, such as misconduct with weapons, sexual assault, child abuse, arson, robbery, aggravated assault or conspiracy to commit murder." Of 123,000 applications for purchase received by the Arizona Department of Public Safety in 2000, 10,000 needed further research. The agency completed only half of the red-flagged checks in the allotted three days, auditors reported, letting the remaining 5,000 purchases go through. These developments demonstrate that 3 business days is not enough time to ensure that criminals and other dangerous people can't get guns. With this growing body of evidence that the current 3 business day rule is insufficient to keep guns out of the hands of criminals, would you support expanding the time allowed for law enforcement to complete background checks to at least 5 business days?

ANSWER: This is a matter of policy about which the Attorney General would confer with officials at the Justice Department and with the President of the United States in arriving at a decision. The Attorney General will vigorously defend federal gun control statutes passed by Congress whenever there is a good-faith and conscientious basis for doing so.

On June 28, 2001, the Attorney General announced a comprehensive initiative to improve the NICS system. As part of the comprehensive improvement plan, and in recognition that the background check system is only as good as the criminal records it contains, the Attorney General issued a directive to the Bureau of Justice Statistics to conduct a comprehensive, state-by-state review of missing or incomplete criminal history records, including adjudication records of cases of mental illness and domestic violence. Based on that review, the BJS will target its grants to those states where improving records repository would have the most impact on the background check system.

56. On April 10, 2001, the U.S. District Court for the Eastern District of Pennsylvania issued an opinion calling into question the constitutionality of the federal law making it a crime for a convicted felon to possess a firearm (18 USC §922 (g)(1)). The court said that the law is out of step with modern Commerce Clause jurisprudence, including the Supreme Court's ruling in *U.S. v. Lopez* which found that possession of a firearm in a school zone is not a commercial activity and therefore held that the Gun-Free School Zones Act exceeded Congress' authority under the Commerce Clause. It is your intent to vigorously defend the constitutionality of the federal statute in question?

ANSWER: Yes, we will vigorously defend federal gun control statutes passed by Congress whenever there is a good-faith and conscientious basis for doing so.

57. Congress has previously considered legislation (H.R. 218, 105th Congress) which would require the Attorney General to classify states for the purpose of easing restrictions on the interstate carrying of concealed firearms. Such "reciprocity" legislation is a high priority for pro-gun organizations. Would you support easing restrictions on the carrying of concealed firearms?

ANSWER: This is a matter of policy about which the Attorney General would confer with officials at the Justice Department and with the President of the United States in arriving at a decision.

58. Considering your familiarity with judicial review and stare decisis, how do you explain your letter to the NRA's James Baker regarding your views of the Second Amendment?

ANSWER: We believe the letter to Mr. Baker is self-explanatory. The text and original intent of the Second Amendment is quite clear in protecting an individual right to keep and bear arms.

59. You omit any discussion of the Supreme Court's decision in *United States v. Miller*, which states that the 2nd Amendment must be interpreted in light of its purpose to maintain the effectiveness of state militias. Since this case represents the authoritative interpretation of the 2nd Amendment, how could you fail to mention this controlling case from 1939 – which has never been questioned, limited or overruled by the Supreme Court – in your letter?

ANSWER: The letter was not meant to be an exhaustive disquisition on the subject. There are several Supreme Court opinions dealing with the subject. *Miller*, the most recent, in no way forecloses an individual rights view of the Second Amendment.

60. In a letter written on August 22, 2000, Seth Waxman, the former Solicitor General, wrote that rather than holding that the Second Amendment protects individual firearms

rights, courts have uniformly held that it precludes only federal attempts to disarm, abolish, or disable the ability to call up the organized state militia. This statement is at odds with the view described in your letter to Mr. Baker. Given your position as the Attorney General and the fact that you wrote this letter on Department of Justice letterhead, is your letter to the NRA an indication that the Department of Justice has changed its view of the 2nd Amendment?

ANSWER: The prior Administration took the view that the government has the constitutional authority to prohibit law-abiding citizens from owning any firearms, including rifles and shotguns. That view was not shared by former AG's as recent as William Barr, and is not shared by this Administration.

61. As this letter is at odds with the views of the longstanding, previously stated position of the Justice Department, what process did you undertake to vet the letter before sending it?

ANSWER: Consistent with longstanding practice, the Department of Justice does not disclose pre-decisional materials or information regarding internal deliberations.

62. Please describe the vetting process for the letter and identify those individuals at the Department who were responsible for preparing it and how much time such individuals spent preparing the letter.

ANSWER: Consistent with longstanding practice, the Department of Justice does not disclose pre-decisional materials or information regarding internal deliberations.

63. Specifically, did you vet it through the Solicitor General's office, which has responsibility for overseeing the Department's position in United States v. Emerson?

ANSWER: Consistent with longstanding practice, the Department of Justice does not disclose pre-decisional materials or information regarding internal deliberations.

64. Did you vet it through the Criminal Division and the Executive Office of United States Attorneys, which have responsibility for prosecuting Gun Control Act cases that could be affected by a shift in Department policy regarding the Second Amendment?

ANSWER: Consistent with longstanding practice, the Department of Justice does not disclose pre-decisional materials or information regarding internal deliberations.

65. Did you vet it through the Office of Legal Counsel for its legal opinion or through the Office of Legal Policy to determine the impact of the letter on Departmental gun policy?

ANSWER: Consistent with longstanding practice, the Department of Justice does not disclose pre-decisional materials or information regarding internal deliberations.

66. Please identify any federal or state gun laws which would invalidated under, or otherwise inconsistent with, the views stated in your letter regarding the 2nd Amendment and, if so, why.

ANSWER: None of which we are currently aware. It would be inappropriate to speculate further. As the Attorney General stated at his confirmation hearings, the Department of Justice will vigorously defend federal gun control statutes passed by Congress whenever there is a good-faith and conscientious basis for doing so.

67. In your view, would either S. 767 (the Reed Gun Show Bill) or S. 890 (the McCain-Lieberman Gun Show Bill) be invalidated under, or otherwise inconsistent with, the views stated in your letter regarding the 2nd Amendment and, if so, why?

ANSWER: The Department has not reviewed the specific text of either bill and therefore it would be inappropriate to speculate.

68. In the case of *United States v. Emerson*, the United States has appealed a district court decision, which held a law preventing an alleged spousal abuser who is under a domestic violence restraining order from possessing a firearm violated the 2nd Amendment. The Department of Justice is arguing in this case that the law is constitutional and furthermore, that the 2nd Amendment is not implicated, as it does not protect an individual right. If Emerson wins his appeal in the Circuit Court, do you plan on appealing this ruling to the Supreme Court?

ANSWER: In the event of an unfavorable decision, the Solicitor General will make a determination concerning whether to seek further review in either the Fifth Circuit or the United States Supreme Court, in consultation with others at the Department of Justice. The Department will continue to defend the constitutionality of 18 U.S.C. 922 (g)(8).

69. Has your letter been directly distributed by anyone in the Department to organizations, courts, officials, media organizations and other advocacy groups, other than the NRA?

ANSWER: The Department has made the letter available to those who have requested it.

Questions Submitted by Representative Gekas

1. **Fraudulent Documents**

There was a recent news article reporting that more than 3,300 blank Texas birth certificates were stolen. Will you commit to using resources to vigorously investigate

There was a recent news article reporting that more than 3,300 blank Texas birth certificates were stolen. Will you commit to using resources to vigorously investigate immigration fraud?

ANSWER: The Immigration and Naturalization Service (INS) is committed to investigating document fraud and conducts numerous fraudulent document and identity theft investigations annually. Investigations are currently underway in most major cities across the country. Title 18 of United States Code authorizes INS to conduct felony investigations of counterfeit document rings. Violators face five years in federal prison and up to $500,000 fines. The dismantling of an organization usually results in the discovery of a cache of documents, including resident alien cards, social security cards, birth certificates, vehicle registrations and drivers licenses. The INS Forensic Document Lab provides critical support by identifying defendants' fingerprints on documents, identifying card stock, and testifying as experts at trial.

Law enforcement and government agencies share information with INS relating to the theft or loss of identification documents. These documents include passports, birth certificates, drivers licenses and state identification cards.

All INS officers are trained in the detection of fraudulent documents. Training is provided at the Immigration Officer Basic Training Course (IOBTC), the Quick Response Team (QRT) Training Course and at INS Journeyman School. Refresher training is offered to key officers within each district and sector as a train the trainer program.

The INS also provides fraudulent document detection to local enforcement agencies. In addition to local officers providing training to law enforcement agencies, the INS Forensic Document Lab provides training in larger settings such as conferences and classrooms. The INS, through the International Association of Chiefs of Police (IACP), hosts several major conferences a year for local law enforcement covering a variety of topics, including fraudulent documents.

2. <u>Requested Documents/Information</u>

Over the last several years, the INS has been extremely slow to turn over information/documents requested of it by the Subcommittee on Immigration and Claims. For example, on September 11, 2000, then Chairman Smith asked for several documents regarding the Convention Against Torture for a hearing on the subject that month. To this day, the subcommittee has still not received much of that requested information. Will you commit to ensuring that the INS provide the Immigration Subcommittee and this committee with all the information that is requested and in the agency's possession in a timely manner?

ANSWER: We recognize the Committee and Immigration Subcommittee's need for timely information. As for information maintained within the INS, we commit to working diligently to respond to appropriate informational requests from the Committee and Immigration

Subcommittee.

3. Missing Inventory

Recent news articles and the General Accounting Office have discussed the INS's inability to account for its inventory including a missing gas-grenade launcher, guns, and computers with sensitive information, all amounting to $68.9 million. What will be done to correct this situation?

ANSWER: The news articles and the General Accounting Office's observations are based on a Department of Justice Office of the Inspector General (OIG) audit of the INS's property management program. The OIG audit report finding regarding missing inventory is based on 1998 data. The INS has already taken steps to address the problems they identified in that report. Additionally, the INS is implementing all recommendations from the OIG audit report.

The INS reengineered the inventory process in 1998, reducing the administrative burden while focusing limited resources on high-risk, high-dollar value property, including computers and firearms. Since 1998, all personal property with an original cost of more than $5,000 and all firearms are inventoried annually. The accuracy of those inventories are certified by senior managers (i.e., Management Team members, District Directors, Chief Patrol Agents, etc.). The inventories are then independently reconciled and audited. The INS has passed the Chief Financial Officers' Act audit for capitalized personal property each of the last three years.

4. Contempt Authority of the Immigration Judges over INS Counsels

What is the agency's position on the contempt regulations that make INS attorneys subject to punishment by DOJ immigration judges?

a) What is the status of the regulations providing such powers?

ANSWER: The last Administration fully debated many issues relating to the implementation of the contempt authority. There remains an issue as to whether the Immigration Judge's contempt authority should apply to the INS trial attorneys and other Department of Justice employees, who are already subject to sanctions through the Department's Office of Professional Responsibility. We have not yet had an opportunity to fully consider this specific issue and to review draft regulations.

5. Medical Care Visits

Many people come to the United States for medical care. The Immigration Subcommittee is contacted several times a year by Members' office concerning cases where a family has come to the U.S. to seek medical care for a child, that medical care has required an extended stay on the part of the family, and INS has moved to deport the family. Rather than moving private bills for these individuals, it has been the practice of the Subcommittee to work with INS to allow these individuals to stay until such time as they can safely return to their country. In the last few years, it has become clear that

individual district directors are threatening this collegial practice between the Subcommittee and INS. There have been some instances where a district director, rather than working with INS headquarters and the Committee, makes every attempt to stall and delay the resolution of these cases because he or she does not want to help a particular family. For example, the Subcommittee has been attempting to rectify a medical case out of the Norfolk office for over two years. It would appear that some district directors believe they are autonomous in their decision-making. Is this an attitude condoned by the Justice Department? If not, what steps will be taken to assure that the INS headquarters can reliably commit to the actions of its regional and district offices in these cases?

ANSWER: We always want to be aware of any instances in which the Subcommittee feels that a district director is not handling a case appropriately. INS has advised Subcommittee staff that deferred action was granted in the Norfolk case on June 19. Deferred action is generally reserved for the most compelling cases and can only be granted by the INS Regional Director, after a recommendation by a District Director. On a broader scale, District Directors exercise prosecutorial discretion every day, based on a case-by-case analysis, but such discretion may only be exercised within the parameters of the Immigration and Nationality Act and accompanying regulations. However, District Directors are not autonomous and must operate within the chain of command, which starts at the INS Regional level, moves to INS Headquarters and the Commissioner, and ends with the Attorney General. The Justice Department would not condone any attitude that is inconsistent with this framework. We encourage the Subcommittee to keep the Department apprized of any instances in which the Subcommittee feels that a District Director is not working appropriately within this framework.

6. **Office of Chief Administrative Hearing Officer (OCAHO)**

Are you aware that the Office of Chief Administrative Hearing Officer (OCAHO) has a very low case load of employer sanctions and discrimination cases and have been filling in to help the Board of Immigration Appeals with its case load for years?

a) **Are you aware that OCAHO's case load is so low because the INS has largely abandoned checking employer compliance with immigration laws?**

ANSWER: Yes, we are aware of the declining caseload of the Office of the Chief Administrative Hearing Officer (OCAHO). Although the number of cases received by OCAHO has fluctuated from year to year, the general trend has been downward since the early 1990's. In Fiscal Year 1993, the number of cases which OCAHO received was 352, while the number of cases for the first eight months in Fiscal Year 2001 is 62.

The number of cases has decreased in part because INS focuses its enforcement resources on employers who knowingly and repeatedly violate the law, rather than on pursuing larger numbers of cases for technical violations. The INS strategy targets employers tied to smuggling, distribution of false documents, and other criminal behavior. These cases are more complex, seek larger penalties including criminal charges and by their nature take more time and personnel to bring to completion, and, we think have a greater impact.

Since August of 1998, the Administrative Law Judges have been empowered to assist Board panels in the adjudication of Board cases as temporary Board Members and have received and completed 8,013 cases during that time.

In the area of document fraud, a settlement was recently approved in the class action lawsuit of *Walters v. Reno,* the case which has effectively suspended enforcement of the civil document fraud provisions of Section 274C of the INA and resulting cases for the past four years. Settlement of the *Walters* case could increase OCAHO's caseload as INS resumes enforcement of Section 274C.

OCAHO CASE RECEIPTS AND COMPLETIONS FY 1988 THROUGH 6/01/01

	FY88	FY89	FY90	FY91	FY92	FY93	FY94
RECEIVED	180	682	502	364	415	352	288
COMPLETED	75	487	618	419	395	365	273

	FY95	FY96	FY97	FY98	FY99	FY00	FY01
RECEIVED	227	159	168	95	63	106	62
COMPLETED	263	172	184	137	67	122	39

OCAHO CASE RECEIPTS AND COMPLETIONS FY 1998 THROUGH 6/01/01 FOR THE BIA

	FY98	FY99	FY00	FY01
RECEIVED	116	2888	3011	1998
COMPLETED	116	2888	3011	1998

7. <u>Immigration Judges</u>

Historically, private bills in the thousands were introduced because introduction of a bill stopped the deportation of an individual. For many years, in response to this abuse of the system, the INS Commissioner and the Chairman of this Committee have entered into an agreement at the beginning of each Congress concerning private immigration bills. That agreement states that only upon a vote by the Committee to request an INS report may any deportation order for an individual be stayed until the Committee acts in the negative or the current Congress ends. It has come to the attention of the Subcommittee that immigration judges are staying the deportation of individuals who are in proceedings because a private bill has been introduced. This is contrary to that agreement. What, if any, steps are being taken by the Justice Department to ensure that Executive Office of Immigration Review's immigration judges are made aware that delays in deportation processing of individuals for which a private bill has been introduced are not to occur unless the Congress takes action on the bill?

ANSWER: The Department is aware of only a few instances where a case was continued on account of the introduction of a private bill.

We share your concern about the need to follow a consistent process. The Department is

in the process of conferring with the Office of the Chief Immigration Judge (OCIJ) regarding private bills. OCIJ has agreed to inform the courts of the agreement worked out between INS and this Committee and has agreed to issue field guidance explaining the policy and procedures regarding the introduction of private bills. The Chief Immigration Judge agrees that the introduction of a private bill should not interfere with or delay the immigration court proceedings.

8. Interior Enforcement

Interior enforcement of our immigration laws was greatly lacking under the previous Administration because it was not a priority. How does this Administration plan to improve interior enforcement?

ANSWER: The Administration places a high priority on maximizing deterrence of unlawful migration and enforcing immigration laws in the interior of the United States. The INS aims to meet this priority through effective and coordinated use of resources to reduce the incentives for unauthorized employment, remove illegal aliens expeditiously, and address interior smuggling and fraud.

In 1997, the INS began developing a new Interior Enforcement Strategy (IES) to respond more effectively to the changing patterns and consequences of illegal immigration. Progress made under the Border Patrol National Strategy shifted illegal crossing patterns along the border and changed the transportation routes that carried illegal workers across the nation. Alien smuggling grew to an annual $7 to $8 billion industry. Organized smuggling networks led to the recruitment and transportation of illegal workers to places of employment. Illegal immigration also drew on more sophisticated and higher quality counterfeit documents and the use of fraud to bypass controls over illegal entry.

The 1999 IES poses a plan to deter illegal migration, prevent immigration-related crimes, and remove individuals who are unlawfully present in the United States in order to reduce the size and annual growth of the illegal resident population. The INS has been working towards improving interior enforcement through a focused, intelligence-driven approach. Intelligence data obtained from INS sources, other law enforcement agencies and the international intelligence community, is constantly analyzed to identify specific organizations, routing and methods. Utilizing this data the INS has identified 40 major, international smuggling organizations and a large number of smaller organizations. Targeting folders have been compiled on at least 22 organizations. These organizations are ranked according to specific factors, such as propensity for violence, exploitation, trafficking in minors, volume of smuggled aliens, and presence of drugs. These continued efforts focused on smuggling and trafficking cases have resulted in disruption of established criminal smuggling organizations. For example, in Operation "Crazy Horse" four persons were indicted in the first indictments brought under the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA). This case involved smuggling foreign nationals to the United States, and then forcing the victims to engage in the commercial sex trade. During calendar year 2000, the INS prosecuted 4,100 alien smugglers,

the majority of which are reactive or less complex cases. By targeting significant smuggling organizations we can exert much greater impact on illegal migration.

In order to deter document fraud, the INS is deploying 44 new benefit fraud positions in FY 2001 to ensure the integrity of the legal immigration process.

The INS seeks to develop ways to work continually with local communities to assess their needs and to respond to law enforcement demands. Some of the Service's activities to meet community and law enforcement needs include:

- Developing new policies on area control and cooperation with local law enforcement agencies;
- Implementing Quick Response Teams to respond to state and local law enforcement agencies when they encounter criminal and illegal aliens; and
- Expanding the Law Enforcement Support Center, which responds to inquiries from federal, state, and local criminal justice agencies concerning foreign-born individuals under investigation or arrested for commission of an "aggravated felony" or other criminal offenses.

INS has dramatically improved its performance in removing criminal and other illegal aliens. Every year since FY 1993, INS has set a new record for removals. The Service has placed a high priority on the removal of criminal aliens from the United States, and the number of criminal removals has increased every year since 1993.

Removals for FY 2000 were nearly 184,000, more than three times the FY 1995 removals of 50,924. The increase in removals has been bolstered by INS' expanded cooperation with other law enforcement agencies in removing criminal aliens (e.g., through the Institutional Removal Program, which identifies and processes deportable inmates prior to their release from Federal, state, and local correctional facilities).

9. U.S.-Mexico Talks

What is the Administration's goal for the migration negotiations with Mexico?

ANSWER: We are engaged in wide-ranging talks with Mexico on a variety of immigration and other issues. Presidents Bush and Fox created a high-level working group consisting of the U.S. Attorney General and Secretary of State and the Mexican Secretary of Interior and Secretary of Foreign Relations to oversee these talks. The Departments of Justice and State have been providing, and will continue to provide, briefings to Congress on the status of the talks and we will continue to solicit input from Congress and others on these important matters.

10. Border Patrol

Aliens illegally entering the country are risking their lives by crossing in the desert

and other difficult terrain. Some are dying. Various immigration advocacy groups blame these deaths on the effective Border Patrol programs like Operation "Hold the Line." Do you commit to having the Border Patrol vigorously patrol our borders and not to ease up on their successful programs to enable smoother, safer illegal entries?

ANSWER: The United States Border Patrol is vigorously committed to the mission of protecting our Nation's borders. Proactive measures like Operation Hold the Line and Gatekeeper are enforcement initiatives that are part of the multiyear, multiphase national strategy to secure our Nation's borders. Both operations have shown success. Apprehensions in San Diego are now at a 28-year-low. Much of the violent crime associated with crossing the border has been mitigated with the Border Patrol's forward deployment strategy. Border banditry in some areas has been eliminated. Overall, the rule of law and quality of life has returned to areas where these enforcement initiatives have been implemented.

Historically, illegally crossing the border has been a dangerous rite of passage. From the time someone leaves their home, the possibility of encountering bandits, unscrupulous smugglers or the hostile environment of the southwest border is a serious concern.

The Border Safety Initiative (BSI) is a binational strategy designed to make the southwest border safer for everyone by reducing injuries and fatalities. Implemented in June 1998, the BSI draws on longstanding public safety measures practiced locally by the Border Patrol along the southwest border. Over the past several years, unscrupulous alien smugglers have moved migrants into more remote areas with hazardous terrain and extreme conditions. Every aspect of our operations takes the safety of migrants, agents, and border residents into consideration.

Since 1999, Border Patrol Agents along the southwest border have participated in over 4,000 rescue operations. These migrants would have been severely injured or become victims of the elements had it not been for the dedicated work of Border Patrol Agents. Other successes of the BSI include the implementation of highly-trained search and rescue teams, aquatic rescue capability, and a binational public safety campaign.

Recent and past support for improved border safety has come in many forms. The past administration was committed to the Border Patrol in manpower and funding. The Bush Administration has shown concerted focus on the continued improvement of border safety, starting with a commitment to hire 570 additional Border Patrol Agents a year. Through the BSI and in cooperation with the Mexican Government, the Border Patrol has conducted binational training, developed a Mexican liaison unit in every Sector, and produced public service announcements.

11. S Visas

Authorization for the "S" visa expires this fall. Does the Administration wish the provision to be re-authorized? Should the provision be made permanent?

ANSWER: Yes. The current provision expires again on September 12, 2001, and needs to be reauthorized and made permanent.

12. **Board of Immigration Appeals (BIA)**

You should be aware that we've received complaints from immigration judges about what they characterize as dangerous, activist, unprecedented BIA decisions by individual Board members or small panels regarding the release of criminal aliens from detention or rulings that their crimes are not serious. Will you commit to periodically reviewing BIA decisions to ensure the safety of Americans?

ANSWER: The Department is aware that these concerns have been raised. We also believe and would like to assure the Committee that the appropriate mechanisms for reviewing decisions of the Board of Immigration Appeals do exist and will be pursued where appropriate.

In its quasi-judicial role, the Board is responsible for interpreting and applying the immigration laws in a balanced manner that takes into account both the rights of individuals facing removal and the interests of the United States, and in a manner that is faithful to the intent of the law. We remain confident that the Board takes this responsibility seriously.

Nevertheless, there may be disagreement within the Board regarding an individual opinion. This may be particularly true of issues regarding detention of criminals and the severity of their crimes. This area of the law has seen many changes in the past few years and offers many cases of first impression for determination by the Board. Disagreements will be frequent until the law becomes more settled.

Both parties have avenues for redress to challenge a decision of the Board. The individual facing removal may file a motion to reconsider the decision, or may pursue an appeal in the Federal circuit courts of appeal.

The INS may also file a motion to reconsider. Additionally, the Board is required to refer any case to the Attorney General for review when requested by the Commissioner of the INS. Furthermore, the Attorney General can direct the Board to refer a case, and the Board on its own motion may refer a case.

We assure the Committee that the INS will refer a case to the Office of the Attorney General if it deems the case important, and will direct a referral where necessary. However, we would point out that referrals historically have been made on only rare occasions. There is good reason for this. Although the Attorney General has authority to adjudicate appeals in immigration proceedings, that authority has been delegated to the Board. The Board is the appellate tribunal within the Department of Justice for the review and final determination of immigration proceedings initiated by the INS and litigated before Immigration Judges. Given this delegation, the Attorney General's review authority will be exercised, but it will be done sparingly and only in cases of sufficient merit.

Questions Submitted by Representative Chabot

Investigation of Cincinnati Police Department

1. As you mentioned in your opening statement, and as Mr. Chabot and you recently discussed over the telephone, there has been some very unfortunate racial unrest in Cincinnati and the entire community has been deeply troubled by these events.

As you know, some national media reports have suggested that the problems stem from the Cincinnati police being involved in the deaths of 15 African-American suspects since 1995. However, the media reports generally failed to mention that the vast majority of these incidents involved suspects wielding weapons and threatening police. According to a story written by Derrick DePledge in the May 20 edition of *The Cincinnati Enquirer*, six were armed with guns, another took away an officer's gun and shot another officer. One suspect was armed with a knife, one wielded a brick and charged police, and another threatened police with a board containing protruding nails. Another two incidents involved suspects in cars, one of whom tragically dragged an officer to his death in September 2000.

The Committee is hopeful that the Justice Department will proceed with its investigation of the Cincinnati Police Department in a fair and open-minded manner, carefully reviewing the facts while conducting the investigation in a cooperative manner.

Please explain how and why Cincinnati was chosen by the Justice Department for an investigation and how the Justice Department intends to select jurisdictions in the future for such investigations?

ANSWER: On April 7, 2001, Timothy Thomas, a 19-year-old unarmed man, was shot and killed while running from the police. Mr. Thomas was the fifteenth person, all of them African-American males, to die in encounters with the Cincinnati Police Division ("CPD") in the last six years. While a number of the 15 killed by the police were armed, at least two of the other incidents raise serious questions about CPD officers' conduct. Two Cincinnati officers have been indicted in the November 2000 death of a shoplifting subject who the medical examiner found died of asphyxiation.

The incident involving Mr. Thomas set off a rash of protests, which led to the setting of fires, vandalism, looting, a motorist being dragged from her car, and a police officer being injured when shot at by a protester. On April 12, the City declared a state of emergency and imposed an 8 p.m. to 6 a.m. curfew, which lasted until April 16. The Department's Community Relations Service was the first federal agency on site within 24-hours of the first racial disturbances to provide immediate conflict resolution and violence prevention services. The City also requested the Justice Department's help in reviewing its policies and procedures. The U.S. Attorney, Ohio legislators, and the NAACP asked the Civil Rights Division to open a pattern or practice investigation of the police department.

On May 7, the Attorney General announced that the Civil Rights Division's Special Litigation Section would conduct a pattern or practice investigation of the CPD's use of deadly and non-deadly force, pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14141.

Regarding the selection of jurisdictions for future investigations, the Department receives thousands of complaints and referrals requesting an investigation of alleged police misconduct. In its initial review of police misconduct allegations, the Department assesses whether the allegation, if proven, would establish a violation of federal law the Department has authority to enforce. The Department also assesses whether the allegation suggests a possible pattern or practice of misconduct, as distinguished from sporadic misconduct or the actions of isolated officers. If the initial review uncovers information tending to support the existence of a pattern or practice violation, authorization may be sought from the Assistant Attorney General to conduct a pattern or practice investigation.

Since the statute was enacted in 1994, the Department has received more credible allegations of a pattern or practice that warrant investigations than we have been able to pursue. The Department exercises its discretion to prioritize certain investigations or certain types of allegations. In general, the Department considers a variety of factors, including the seriousness of the alleged misconduct, the type of misconduct alleged, the size and type of law enforcement agency, the amount of detailed, credible information available and the potential precedential impact. So far, our investigations have focused on allegations of excessive force, including associated search and seizures issues, and racial or ethnic discrimination in traffic or pedestrian stops. All types of law enforcement agencies have been investigated: state, urban, suburban and rural. We have investigated both large and small agencies.

2. The Committee recognizes that you made a commitment to a cooperative approach with Cincinnati on May 7, 2001 when you issued a statement announcing that the Justice Department had opened a pattern or practice investigation of the Cincinnati Police Department and that the Justice Department will provide Cincinnati with expert technical assistance on how to best reform its policing practices. You said the Justice Department's focus "will be on assisting the City to solve its problems and rebuild trust among citizens of Cincinnati" and that the Justice Department "will work cooperatively with the City to institute policing reforms as quickly as possible."

From what the Committee knows about pattern and practice investigations conducted by the Justice Department's Civil Rights Division under the prior Administration – such as the investigations into Pittsburgh, and the Steubenville and Columbus, Ohio police departments – those investigations were conducted in a more adversarial manner. So your stated approach *is* something new. How does the Civil Rights Division intend to implement these changes?

ANSWER: See answers below.

a) Will the Division notify the City and the Cincinnati Police Department of its findings as it goes along during the investigation?

ANSWER: Yes. As the investigation proceeds, the Department will notify the City and the CPD of its findings.

b) Will the City be given a chance to voluntarily make changes to its policies without being bound to a consent decree?

ANSWER: If deficiencies are found in the CPD's use of force, the Department will provide the City and the CPD with expert technical assistance on how to best reform their policing practices. To the extent that the need for potential improvements are identified, the Department hopes to work closely with the CPD to implement appropriate changes in policies, procedures or practices.

3. Your statement additionally said that the investigation will involve "a thorough and independent review of Cincinnati Police Department's policies and practices." The Committee knows that investigations of this nature typically involve many different types of action, such as interviews with police officers and members of the community and reviews of written policies and practices.

a) Are there any particular actions that have already been taken by the Justice Department?

ANSWER: A team from the Justice Department, including Civil Rights Division attorneys and police practices experts, have been meeting with City officials, including the City Manager, the Mayor, the Acting Safety Director, the City Solicitor, the Police Chief, and the City's outside counsel. At those meetings, Justice Department representatives have discussed how the investigation would be conducted and the standards to be applied, answered the questions of City officials, and begun discussions regarding CPD policies and procedures for the use of deadly and non-deadly force, investigations, training, management, supervision and discipline. The City has already provided some relevant documents to the Justice Department, including the CPD's policies and procedures and some training materials. The City has promised to provide considerable additional documents regarding CPD policies and procedures, as well as reports pertaining to incidents in which the CPD used deadly or non-deadly force. Justice Department representatives have also met with the local chapter of the Fraternal Order of Police, the Black Police Officers' Association, the legal defense bar, attorneys who have brought a class action suit alleging that the CPD has engaged in discriminatory policing, the NAACP, and various other community groups and individuals with relevant information.

b) What actions do you foresee the Justice Department taking in the near future?

ANSWER: The Department will continue its investigation by conducting a

comprehensive evaluation of CPD's policies, procedures and actual practices of deadly and non-deadly force. The Department's investigatory team will be reviewing use of force policies, procedures, training, and incidents, and conducting in-depth interviews with police command staff, individual officers, representatives of police labor organizations, persons who believe that they have been subject to police misconduct, lawyers, and members of the community who have dealings with the CPD.

4. Is the Justice Department investigating the firing into a crowd of non-lethal, pellet-filled beanbags on April 14, 2001 by six members of the Cincinnati Police Department's SWAT team?

a) If so, under what federal statute is the investigation being conducted?

ANSWER: The Criminal Section of the Civil Rights Division, in conjunction with the U.S. Attorney's Office, is conducting an investigation into allegations that several Cincinnati police officers fired potentially lethal beanbag shotguns into a crowd of citizens on April 14, 2001. The allegations indicate possible violations of 18 U.S.C. 242, deprivation of rights under color of law. This investigation is separate from the Department's pattern and practice investigation into the CPD.

i) At what stage is the Department's investigation?

ANSWER: See answer to 4(a) above.

ii) Is the investigation being conducted separate and apart from the Justice Department's "pattern and practice" investigation of the Cincinnati Police Department?

ANSWER: The criminal investigation is a separate and distinct investigation, focusing specifically on whether criminal laws were violated when shots were fired.

b) If not, is the Department planning to initiate such an investigation?

ANSWER: The Department's pattern or practice investigation is a comprehensive review of all use of force by the CPD. The pattern or practice investigation will review the beanbag incident, along with others, and relevant policies procedures and training, to determine if a pattern or practice of excessive use of force exists.

5. Describe the history of the Justice Department's investigation into, and prosecution of, non-lethal, police-misconduct cases.

ANSWER: The Criminal Section of the Civil Rights Division, in conjunction with U.S. Attorneys' Offices, prosecutes law enforcement officers for violating the rights of citizens pursuant to 18 U.S.C. 242, which prohibits those acting under color of law from willfully

depriving a person of a right protected by the Constitution or laws of the United States. For example, under the Constitution, people in this country have a right not to be subjected to excessive force by public officials. That right extends to non-lethal force if that force is otherwise excessive or unreasonable. A beating of a handcuffed, non-resisting person may be excessive even if it is not lethal. While federal law establishes other rights enforceable under section 242, such as the right not to be deprived of property without due process of law, the majority of cases brought under this statute involve charges that a law enforcement officer used unreasonable force against a person. The statutory penalty for these types of violations varies depending on the degree of injury to a victim: assaults which do not result in injury are normally misdemeanors punishable by up to one year of imprisonment; assaults involving some bodily injury carry a penalty of up to ten years' imprisonment; and assaults resulting in death are punishable by imprisonment for any term of years or for life, and also qualify for the imposition of the federal death penalty. In the past five years, 337 law enforcement officers nationwide have been charged with violations of section 242, most for assaults resulting in bodily injury short of death. Historically, the conviction rate in law enforcement misconduct cases is approximately 75%.

Employment-Discrimination Cases Challenging Literacy Tests Using Disparate-Impact Theories

6. You should have received a letter dated May 14, 2001 from Wayne Flick at Latham & Watkins regarding the Department's lawsuit against the City of Garland, Texas. In a nutshell, the Civil Rights Division sued the City of Garland in February 1998, alleging that the City's police and fire departments engaged in acts of intentional discrimination and used employment tests for entry-level hiring that had a disproportionate effect on racial minorities. The Division withdrew its allegations of intentional discrimination after it was unable to uncover during discovery any credible information that substantiated those allegations. Its allegations regarding the City's employment tests remain.

a) In light of the fact that the Division's remaining claim seeks to end the City's use of literacy tests for police officers and firefighters in favor of tests (or test batteries) that measure personality traits such as integrity, dependability, and assertiveness -- traits already measured by the City through oral interview panels, background investigations, psychological screenings, and polygraph examinations -- will you instruct the Civil Rights Division to end its seven-year-plus pursuit of the City of Garland and dismiss the lawsuit?

ANSWER: Civil Rights Division litigation involving selection examinations for public safety positions, including United States v. City of Garland, No. 3:98-CV-0307-L (N.D. Tex.), does not seek to end the use of written tests of cognitive skills. Rather, in such cases, the Division seeks to enforce the disparate impact provisions of Title VII of the Civil Rights Act of 1964. Title VII explicitly prohibits the use of any employment selection device, including a written test, that results in disparate impact on the basis of race or national origin unless the employer can demonstrate that its use of the device "is job related for the position in question and consistent with business necessity." The City of Garland selects police officers and

firefighters in descending rank order based on applicants' scores on certain written tests that, at best, measure only a narrow set of cognitive skills. It is the position of the United States that Garland's use of those particular tests to select police officers and firefighters has severe disparate impact against African American and Hispanic applicants and cannot be shown to be job related and consistent with business necessity. The parties have engaged in over three years of discovery and trial preparation and a two-week trial on the issue of liability was concluded on August 24, 2000. After conclusion of the trial, the court ordered the parties to file findings of fact and conclusions of law by November 2 and their objections thereto by November 26. Pursuant to the court's order, post-trial briefs may be filed up to December 31, 2001.

b) Will you instruct the Division to dismiss a nearly-identical lawsuit filed against the State of Delaware on January 10, 2001 – in the waning days of the Clinton Administration?

ANSWER: The United States' lawsuit against the State of Delaware involving selection of entry-level Delaware State Troopers, United States v. State of Delaware, No. 01-020-RRM (D. Del.), is not "nearly identical" to the Garland case. The two cases are similar in that they both involve the use of the Wollack & Associates Alert examination to select entry-level law enforcement officers. However, the facts of the two cases are different in several important respects.

The Delaware case is in the early stages of discovery and trial is scheduled to begin on August 5, 2002. While the Department continually reviews the merits of ongoing litigation and will do so as discovery and preparation for trial proceed in the Delaware case, the information thus far made available to the United States by the State of Delaware supports the United States' allegation that the defendant's use of the Alert examination to select Delaware State Troopers had a disparate impact against African American applicants in violation of Title VII.

7. On May 14, 2001, Garland's City Attorney filed a Complaint of Ethical Misconduct with the Justice Department's Office of Professional Responsibility alleging various acts of ethical misconduct by the six Civil Rights Division trial attorneys from the Employment Litigation Section that are litigating the *City of Garland* case. What is the Department's position regarding that ethics complaint?

ANSWER: Complaints made to the Department's Office of Professional Responsibility are confidential. It would be inappropriate for the Department to comment about any such complaint.

8. Do you believe that under Title VII of the Civil Rights Act of 1964, the Civil Rights Division (or any other Title VII plaintiff for that matter) can establish an unlawful employment practice based on disparate impact by proposing an alternative to a police or fire department's literacy test that not only fails to measure literacy skills at all, but also

measures skills -- like personality traits -- that are already being measured by the department? Do you believe that if the Division prosecutes such cases and succeeds, the Division will have used Title VII to accomplish the elimination of cognitive-skills testing, which is something Congress did not intend?

ANSWER: Title VII of the Civil Rights Act of 1964 prohibits the use of an employment selection device, including a written test, that results in disparate impact on the basis of race, national origin or other protected characteristic unless the employer can demonstrate that the device is used in a manner that "is job related for the position in question and consistent with business necessity." Even if the employer can make such a demonstration, use of a selection device violates Title VII if it can be shown that there is an alternative employment practice that the employer has failed to adopt and that would result in less disparate impact and also serve the employer's legitimate operational needs.

Written cognitive-only tests (measuring such skills as reading comprehension, writing ability, etc.) often have a significant disparate impact on African American and Hispanic applicants. The Civil Rights Division has never sought to end the use of cognitive tests. It is important to limit these tests, however, to circumstances that meet the job related and consistent with business necessity requirements. The Division believes that Title VII requires employers to consider carefully how these tests are used in the selection process to minimize their adverse impact.

The Civil Rights Division's disparate impact litigation is not intended to and will not result in the elimination of cognitive skills testing as part of the selection process for public safety employees. It's goal is to make sure that qualified minorities, who possess the requisite cognitive and other skills required to excel in public safety jobs, have an opportunity to qualify for those jobs. In other words, the goal is the elimination of unnecessary barriers to the employment of African Americans and other minority group members as police officers and firefighters. That is what Title VII requires.

Racial Preferences and Other Constitutionally-Suspect Classifications

9. What is the extent to which opposing racial preferences and other constitutionally-suspect classifications will be a priority for the Civil Rights Division?

ANSWER: The vigorous and fair enforcement of all of the nation's civil rights laws is among the highest priorities of the Department. The nominee for Assistant Attorney General for the Civil Rights Division, Ralph F. Boyd, was confirmed by the Senate on July 20, 2001. The Attorney General is looking forward to working with the new Assistant Attorney General to make opposition to racial profiling a priority for the Civil Rights Division.

10. Last year, the Education Department's Office for Civil Rights issued a report on charter schools, written with significant contribution from the Civil Rights Division, that

shows support for race-conscious public school admission policies. Although the document states in one paragraph that a charter school "may not discriminate on the basis of race, color, or national origin in determining whether an applicant satisfies any admissions requirements," it states a few paragraphs later that "[a] charter school may take race into account in making admissions decisions in limited circumstances."

In describing the "limited circumstances" in which a charter school may take race into account, the document broadly states that "[r]ace may be used only in a narrowly-tailored way to meet a compelling interest, such as to remedy discrimination, *to promote the educational benefits of diversity, or to reduce minority-group isolation*." (Emphasis added.) It then backtracks from this statement by stating that "[t]he state of the law in this area is undergoing close examination by the courts[,] [and] [t]he legal standard that applies to your state may vary, depending on State law and the federal circuit in which your state is located."

a) Do you have a problem with this report saying that race may be used "to promote the educational benefits of diversity, or to reduce minority-group isolation," even with a disclaimer, considering that at the time the report was issued, (1) it was illegal to do so in the states which comprise the Fifth Circuit (Texas, Louisiana, and Mississippi), and (2) such an approach had recently come under attack in the First Circuit (Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico) and the Fourth Circuit (Maryland, Virginia, West Virginia, North Carolina, and South Carolina)?

ANSWER: Assessing race-conscious provisions is complex, as illustrated by the differing views of courts on certain issues. The Assistant Attorney General for Civil Rights will work with the Attorney General to ensure that the Department takes appropriate action in this area.

b) Are you even more troubled by this report now that there has since developed a split within a district court in Michigan, which is encompassed by the Sixth Circuit (Michigan, Ohio, Kentucky, and Tennessee), and a decision adverse to the report's position out of a district court in Georgia, which is encompassed by the Eleventh Circuit (Georgia, Florida, and Alabama)?

ANSWER: Several guidance documents previously issued by the Department of Education are undergoing review by the new administration. In our role as legal counselor to the federal agencies, we consult and provide advice as requested. Accordingly, we expect that we will be involved in consultations with the Department of Education on several of these issues.

c) Has the Justice Department taken, or does it plan to take, a position on the cases up on appeal from the district courts in Michigan and Georgia?

ANSWER: The Department filed a brief in the U.S. Court of Appeals for the Eleventh Circuit in Board of Regents of the University System of Georgia v. Johnson but has not filed a brief in the Sixth Circuit regarding the undergraduate or law school case against the University of Michigan.

Covered States or Political Subdivisions Subject to Special Provisions of the Voting Rights Act of 1965

11. According to the Justice Department's web site, there are still eight States that are covered as a whole by the special provisions of the Voting Rights Act of 1965: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina and Texas. Another State – Virginia – is covered as a whole with the exception of four counties that have been released from the provisions, the last of which, Roanoke County, was released on January 24, 2001. In addition, 52 counties in four other States, including 40 counties in North Carolina, and 14 townships in three more States, are still covered by the special provisions.

a) Although the Act contemplates that covered States and political subdivisions, as opposed to the federal government, must initiate the declaratory judgment action required for release from the special provisions of the Act, shouldn't the Civil Rights Division be more diligent in monitoring the covered jurisdictions and in encouraging them to file such actions if warranted under the Act?

ANSWER: It is a priority for the Civil Rights Division to work cooperatively with jurisdictions that express an interest in obtaining "bailout" from the special provisions of the Voting Rights Act pursuant to Section 4 of the Act. When a jurisdiction contacts the Civil Rights Division with an interest in obtaining a bailout declaratory judgment, the Division assigns an attorney to investigate, with the assistance of the jurisdiction, the jurisdiction's eligibility prior to the filing of a lawsuit. Although a court judgment is required, this procedure has been successful in permitting bailout judgments to be entered by consent decree without the need for fact discovery and other litigation expenses. The scope of the factual inquiry needed to determine whether a jurisdiction is eligible for Section 4 bailout makes it infeasible for the Civil Rights Division to identify and determine which covered jurisdictions may be eligible for bailout at any particular time.

b) To what extent is this a priority for the Civil Rights Division?

ANSWER: See answer to 11(a) above.

School Desegregation Cases

12. In the last few years, it has become much more likely that a school desegregation case in which the Civil Rights Division is *not* a party will be dismissed than a school desegregation case in which the Division *is* a party. How does the Department, under your leadership, intend to make it more likely that the Division's desegregation cases will be dismissed where it is appropriate?

ANSWER: The Civil Rights Division will continue its efforts to ensure that school districts operating under federal desegregation orders comply with their obligations. When a district demonstrates such compliance, we will not object to appropriate requests for a finding of unitary status and dismissal.

a) What is the extent to which returning control of school districts to local officials, where appropriate, is a priority for the Division?

ANSWER: Returning control of school districts to local officials remains a priority for the Division, once a formerly segregated school district has shown that it has eliminated vestiges of segregation to the extent practicable and has demonstrated to the formerly disfavored race a good-faith commitment to the court's decrees and the Constitution. These are the benchmarks that were set forth by the Supreme Court in Freeman v. Pitts, 503 U.S. 467, 485 (1992). We are willing to work closely with any district that requests our assistance in assessing the district's readiness for a declaration of unitary status and in working out a cooperative plan to resolve any outstanding issues.

b) Would you support a legislative requirement that the Department issue an annual status report on its desegregation cases?

ANSWER: We would need to see the bill before commenting. We note, however, that the Department has a strong policy against discussing the details of pending cases, litigation, and investigations.

13. Last year, the Subcommittee on the Constitution repeatedly asked for copies of desegregation court orders and consent decrees for the Civil Rights Division's cases. The Division eventually produced most of the orders and decrees (the last production being made six months after the initial request) but informed the Subcommittee that it was a time-consuming process because most of the orders and decrees were located in Federal Record Centers across the country.

a) Because the United States Supreme Court has stated that federal supervision of local school systems was intended as a temporary measure to remedy past discrimination, do you believe that the Division should not have stored away in Federal Record Centers dozens, if not hundreds, of existing desegregation court orders and consent decrees?

ANSWER: Because the Division lacks the office space to maintain all the files associated with the over 400 cases to which it is a party, we continue to rely on the Federal Records Center. We use our limited storage for cases that are currently active. Accordingly, we routinely send documents to Federal Records that do not appear to be needed in the current posture of the case, and we routinely retrieve documents from Federal Records as these circumstances change.

b) Will the Department, under your leadership, require the Division to examine such orders and decrees periodically to ensure their compliance?

ANSWER: Two years ago, the Division initiated a case review project to systematically evaluate school districts' compliance with existing orders to which we are a party and determine what additional actions, if any, should be required of school districts remaining under federal court supervision.

14. During an oversight hearing of the Civil Rights Division by the Subcommittee on the Constitution on July 12, 2000, Chairman Charles Canady requested of then-Acting Assistant Attorney General Bill Lann Lee that the Division provide the Subcommittee with a "status report" on its school desegregation cases including a description of "the last action that was taken in the case." Chairman Canady made clear that the Subcommittee was interested in the current status of each case and that it wanted to know the last action that *the Division* had taken in each case. His previous letters to the Division -- on January 10, 2000 and on May 4, 2000 – and all of his staff's communications with the Department's Office of Legislative Affairs also made that clear.

But the Division provided to the Subcommittee on September 6, 2000 only the nature and the date of the last "litigation-related activity" in the case, regardless of whether that action was taken by the Division, by another party, or by the court. For example, in *Lee and United States v. Macon (Cullman County School District)* (N.D. Ala.), the Division listed the last litigation-related activity as "Consent Order dissolving regulatory injunction and imposing permanent injunction" with a date of July 11, 1974.

The Division placed an asterisk next to those cases in which the latest activity in the cases has actually been "non-litigation related." It described examples of such activities as: "investigation complaints received by the Department from citizens and/or community groups; requesting updated data and information about the district's desegregation efforts and compliance with existing orders; seeking clarifications of data or information previously provided by the district; negotiating with the district as to how it can resolve any desegregation-related concerns we have raised; or responding to requests or questions from school districts." These activities appear to be Division-specific.

***The Division, therefore, did not specify the last action it has taken in each case.* It merely listed the last pleading filed in its cases (by any party or by the court) and indicated with an asterisk where the Division's last activity was an unspecified "non-litigation related" action at an unspecified date. With respect to the filing of pleadings in these cases, out of the approximately 450 cases the Division handles, on nine occasions the last pleading was filed during the 1960s. On 145 occasions the last pleading was filed during the 1970s. And on 60 occasions the last pleading was filed during the 1980s. In some of those cases, the last activity the Division took was an unspecified non-litigation related action at an unspecified date, but in others it was not.**

a) What does the Justice Department intend to do to remedy the fact that the Civil Rights Division was unable to describe the latest actions taken by it in each of its desegregation cases?

ANSWER: The Division's newly instituted case management system tracks the litigation-related activities in all cases or matters in which the Division is involved. In response to previous Congressional inquiries the Division reported on its most recent litigation-related activities.

Regarding last year's oversight requests, we found some of those requests problematic because they appeared to ask for nonpublic as well as public materials, such as information related to ongoing investigations of school districts. In all our cases, we notify the district (or other defendant) of our concerns and make every effort to resolve them without litigation. When we are engaged in these non-litigation activities involving a particular district, we generally do not share with third parties our internal Department assessments of the case or our correspondence with the district. There are important reasons, involving both litigation and fairness, for our not doing so. First, we must maintain the integrity of the Department's deliberative processes by not revealing our attorneys' candid analyses of the facts or waiving well-established litigation privileges (e.g., attorney work product, governmental deliberative process). Second, we would not want to compromise the confidentiality of complaints we receive or discourage complainants from contacting the Department. Finally, we would not want to prematurely reveal the district's problems and possibly expose the district to adverse publicity, thereby jeopardizing our ability to enter into good-faith negotiations, before affording the district a full and fair opportunity to address our concerns. In some instances, moreover, disclosure would be inconsistent with applicable rules of professional responsibility. It is for these reasons that we included only the most recent litigation-related activity in our status reports.

b) What does the Justice Department intend to do to address the fact that in about half of the Division's cases, there have been no court filings in 10, 20, 30, or – in some cases – 40 years?

ANSWER: The absence of litigation-related activity in a case is not always an indication that the case is not being monitored or that there is no substantive activity. Executive Order 12988 (Feb. 5, 1996), which applies to all federal agencies involved in civil litigation on behalf of the U.S. Government in federal court, requires that, whenever feasible, "claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding." Accordingly, in many instances Division lawyers have succeeded in obtaining school districts' compliance and other appropriate relief without resort to court filings or proceedings.

c) Are there Division attorneys assigned to each desegregation case?

ANSWER: Every school desegregation case to which the United States is a party is assigned to an attorney in the Civil Rights Division's Educational Opportunities Section, and the attorney is responsible for that case. These attorneys are generally familiar with the most recent activity in their assigned cases.

i) **If so, do you believe that those attorneys should be able to describe the latest actions taken in each of their cases?**

ANSWER: See answer to 14(c) above.

ii) **If not, why are there unassigned school desegregation cases at the Division?**

ANSWER: See answer to 14(c) above.

15. During the tenure of Bill Lann Lee as Acting Assistant Attorney General -- and then as Assistant Attorney General -- of the Civil Rights Division, the Division objected to roughly just as many covered school districts over the creation or expansion of charter schools as it did over the creation or expansion of traditional public schools. Considering that only about 30 of the roughly 450 school districts the Division monitors have charter schools, this suggests, though it does not prove, that the Division more closely scrutinized charter schools than other public schools.

How does the Department, under your leadership, intend to treat charter schools, as compared to other public schools, that are located within school districts covered by a desegregation court order or consent decree?

ANSWER: The Department will continue to treat charter schools the same way that it treats other public schools operating in school districts subject to court-ordered desegregation plans in cases in which we are a party. Where the operation of the school is consistent with the requirements of federal law, we will not offer any objection. Where the school's operation is inconsistent with federal law, and we are not able to work out our differences regarding the school, we will bring our concerns to the attention of the court.

The Department evaluates any complaint or notice regarding a new school that is brought to our attention, whether that school is a charter school, a magnet school, or a traditional public school. It may be that we are more likely to be notified about a new charter school because of the attention focused on these new enterprises by the community and the press, and because, in some cases, the local educational agency has concerns about the operation of charter schools that it would not bring to us if a similar issue arose regarding a new school it would be operating itself.

Questions Submitted By Representative Barr

2. **"Carnivore"**

The Attorney General has announced he is reviewing the "Carnivore" (aka, "DCS 1000") program, due to privacy concerns arising from its application. In the interim, we understand the program is still being used, subject to approval on a case-by-case basis.

a) **How many times has use of the program been approved since the Attorney General's announcement he was reviewing it?**

ANSWER: See answer below.

b) **What is the highest level Department of Justice official who reviews requests for the program's use?**

ANSWER: See answer below.

c) **What criteria are used by the Department of Justice when reviewing requests for the program's use?**

ANSWER: See answer below.

d) **Have the criteria changed since the Attorney General began his review, to reflect his expressed privacy concerns over use of the program?**

ANSWER: The device DCS1000 has been used on only one new interception since the beginning of January, 2001, excluding classified national security (FISA) interceptions.

The device DCS1000 (formerly Carnivore) is specifically designed by the FBI to intercept, pursuant to lawful authority, electronic communications by the least intrusive means. It is designed to do this forensically, or in a manner that preserves the integrity of the evidence intercepted. Commercial products, and many Internet Service Provider (ISP) capabilities still can not meet these requirements. DCS1000 is only used by the FBI when it is lawfully authorized to do so, and only when other techniques will not work as well. It is focused on legal requirements of interception: 1) Particularity - for example, it has the ability to seize a particular subject's email as opposed to all email; 2) Precision - it is designed to intercept no more than what is specifically authorized in the court order; and 3) Comprehensiveness - it intercepts all of what is authorized and does not "drop packets."

In some instances, ISPs maintain their own technical capabilities which allow them to fully comply with court orders. An example of this would be a "clone" E-mail account. Many court orders, however, go beyond E-mail, authorizing the acquisition of other messages or protocols, such as instant messaging. In this instance, a "clone" e-mail account will not fully satisfy the court order, necessitating the use of DCS1000 or a similar tool. It should be noted that the DCS1000 contains more privacy features than most ISP capabilities or commercial devices.

Department of Justice guidelines require all applications for interception of electronic communications (with the exception of digital display pagers) to receive the authorization of either the Attorney General or a high level Department of Justice official designated by the Attorney General before the local United States Attorneys office can file an application with the court. Applications for electronic surveillance do not identify the specific technique used for interception, thus, DCS1000 does not receive special scrutiny in this regard. Applications must, however, describe with particularity the information to be intercepted. All orders for this type of electronic surveillance are approved at a high level.

In accordance with federal statutes pertaining to electronic surveillance, applications for interception of the content of electronic communication must demonstrate probable cause and, regardless of the technique, state with particularity and specificity: the offenses being committed, the facility or place from which the subject's communications are to be intercepted, a description of the types of conversations to be intercepted, and the identities of the persons committing the offenses and anticipated to be intercepted.

The statutory regimens pertaining to electronic surveillance (Title III of the Omnibus Crime Control and Safe Streets Act of 1969, portions of the Electronic Communication Privacy Act of 1986, and portions of the Communications Assistance to Law Enforcement Act, enacted in 1994), along with procedures and guidelines for implementing them contain a number of privacy protection features. Federal electronic surveillance law must not only comply with the Fourth Amendment's dictates concerning reasonable searches and seizures, but they also include provisions to ensure that this investigative technique is used judiciously and with deference to the privacy of intercepted subjects. Interceptions are required to be conducted in such a way as to "minimize the interception of communications not otherwise subject to interception" under the law, such as unrelated, irrelevant, and non-criminal communications of the subjects and of others not named in the application.

In the past three years, the FBI has worked to develop tools to address the requirement to effectively conduct interceptions of electronic communications in a manner that is consistent with the law (including the privacy provisions thereof). Because many ISPs cannot, on their own, comply fully with court orders, and because commercial equipment generally has not been developed for the purpose of conducting lawful interceptions, it has been necessary for the FBI to develop its own tools. One such tool is the DCS1000. The recent independent technical review (IITRI) recommended that the FBI continue to use DCS1000 rather than less-precise, publicly available sniffer software, when precise collection is required and DCS1000 can be configured to reflect the limitations of a court order. This recommendation reflects IITRI's conclusion that DCS1000 protects privacy better than commercial software currently available.

The Attorney General has asked that Department's newly appointed Chief Privacy Officer to review the DCS1000 system and formulate specific recommendations concerning whether there is a need for further restrictions or modifications on the continued use and development of the system. We anticipate that this review will be completed within the next

several months.

3. <u>"Secret Evidence Repeal Act of 2001"(H.R. 1266)</u>

On May 17, 2001, Congressman Barr sent a letter to the Attorney General, calling for an immediate moratorium on the use of "secret evidence" by the Immigration and Naturalization Service (INS), pending the White House's review of H.R. 1266, a bill virtually identical to a bill endorsed by President Bush during the election campaign. Additionally, Congressman Barr called for the Attorney General to review current INS regulations governing the use of "secret evidence."

a) Will the Attorney General impose a moratorium on the use of "secret evidence", pending White House review?

ANSWER: The Department is reviewing the use of classified evidence in immigration proceedings in order to find the appropriate balance between fair immigration proceedings and the protection of national security interests. While the review is proceeding the Department will make every effort to conduct immigration proceedings without the use of classified evidence unless important national interests require such use. To date in this Administration the Department has not initiated any new immigration cases using classified evidence and has not presented any new classified evidence to any adjudicator at any level in any pending immigration case. It has, however, continued to proceed in certain pending immigration cases using classified information previously submitted to the immigration courts while its review of the issue is ongoing.

b) Will the Attorney General conduct a review of current INS regulations governing the use of "secret evidence"?

ANSWER: See answer to 3(a) above.

c) If the Attorney General has no yet decided whether to impose such a moratorium or conduct such a review, when might a decision be expected?

ANSWER: See answer to 3(a) above.

4. Project ChildSafe is an OJP program. Department of Justice's budget request is for $75 million annually for five years: $65 million per year in matching grants for gun safety locks, $10 million for a toll-free hotline to inform parents of the program.

11. What evidence is there that any parent who currently owns a gun without a lock would be motivated to lock her gun simply because of the offer of a free lock? What is your estimate of the number of these parents? How was this estimate be calculated?

ANSWER: The Administration believes that encouraging parents to use safety locks is an important step to encourage and promote gun safety and the responsible use of handguns. Project ChildSafe is seen as a major step in that direction and in raising the importance of gun safety within the home. Although we are not aware of any actual specific research studies which provide evidence that parents who own guns without safety locks would be motivated to lock their guns if provided with a free gun lock, parent focus groups have been run with positive results regarding the use of safety locks. Further, since participation in Project ChildSafe will be voluntary, it is highly probable that people who choose to obtain the free safety locks would, in fact, use them. The same would not be expected if the program was mandatory in nature.

12. **What evidence is there that free gunlocks prevent or reduce injury or crime? Have studies of any model or trial product been conducted to test the efficacy of the idea? If not, do you plan to conduct interim studies of "Project ChildSafe" to test its efficacy, prior to second year funding? If you plan to conduct such interim studies, how do you propose to fund them?**

ANSWER: Project ChildSafe has been proposed as part of the President's Budget Request for FY 2002. Given this is a proposed new initiative, the Department's Office of Justice Programs intends to begin to evaluate the effectiveness of the Project during the first year of the program to determine the demand for the free locks and their effectiveness in preventing accidental shootings and injury. The Department's Office of Justice Programs routinely requires evaluation of funded programs. The costs of evaluations are covered by dedicating a portion of the appropriated program funds to evaluation costs.

We are aware of studies conducted related to the efficacy of the general use of safe storage locks. For example, the University of Washington published a study in the *Journal of the American Medical Association* in 1997 showing that state safe storage laws intended to make firearms less accessible to children appear to prevent unintentional shooting deaths among children younger than 15 years. In 12 states which had such laws for at least one year between 1990 and 1994, unintentional shooting deaths among children declined over 23%.

Questions Submitted By Representative Jackson Lee

1. **EEOC Harris County Sheriff's Department**

The EEOC Filed a Commissioner's charge against the Harris County Sheriff's Department pursuant to Title VII of the Civil Rights Act of 1964 based on allegations of racial discrimination. Some of the allegations of racism include high ranking department officials referring to African-American deputies as monkeys, a confederate flag in the Sheriff's parking lot during the Martin Luther King weekend, and an African-American inmate hog-tied for eight hours without medical assistance, along with allegations of discriminatory employment practices.

Your office received a referral from the EEOC and in response to my request that your office investigates and where possible, take appropriate action. I contacted your

today but they were unable to answer my inquiry. What is the status of this case?

ANSWER: In 1994, the EEOC began investigating a charge against the Harris County Sheriff's Department alleging discrimination in employment. The EEOC referred this matter to the Justice Department on February 1, 2000. We requested additional documents from the EEOC to complete our review, and received those on March 23, 2001. The Civil Rights Division's Employment Litigation Section is carefully reviewing all of the information provided by the EEOC as well as information provided by the Harris County Afro-American Sheriff's Deputy League ("AASDL") to determine whether the Division will conduct a supplemental investigation, or take other appropriate action.

In addition, through Representative Jackson Lee's March 1, 2001 correspondence, to which we responded on March 29, 2001, and other sources, the Employment Litigation Section is also aware of the February 2, 2001 dismissal of Robert Amboree, the president of the AASDL, by the Harris County Sheriff's Department. Mr. Amboree alleges that he was terminated because he opposed allegedly unlawful discriminatory employment practices, and his allegations are the subject of several media reports. The Division intends to examine this allegation fully in the course of any investigation that it may conduct of the Commissioner's charge.

2. Police Brutality: Cincinnati Case

On April 7, 2001, a Cincinnati police officer, Stephen Roach, was found guilty of a two-count misdemeanor after shooting Timothy Thomas, an unarmed young man, and subsequently obstructing official business in the investigation. Dozens of residents were injured and more than 800 people were arrested during four days of unrest amid charges of discrimination against the police department.

This was a travesty of justice. There are still many unanswered questions remaining in this case, including the contents of the forensic report and the testimony from investigating officers.

I applaud Attorney General John Ashcroft for moving forward on the NAACP's request for an investigation into whether the city's police department has shown "a pattern and practice" of racial discrimination, including use of lethal force. What is the status of this case?

ANSWER: A Cincinnati police officer has been charged locally with two misdemeanors in connection with the shooting death of Timothy Thomas on April 7, 2001. The Department's Community Relations Service remains in close contact with City officials, the CPD, and community leaders, providing technical assistance and conflict resolution services to work toward achieving racial reconciliation. The FBI and the Criminal Section of the Civil Rights Division are currently monitoring that prosecution. In addition, a federal criminal civil rights investigation is underway into allegations that Cincinnati police officers fired beanbag shotguns

into a crowd shortly after Mr. Thomas's funeral on April 14, 2001. We continue to monitor the investigations to identify any incidents for which we may be able to assert federal jurisdiction, should the local investigation fail to vindicate the federal interest in the matter. The Department's Community Relations Service is also monitoring the local investigation to identify any potential flashpoints that may lead to further civil unrest, and to address those situations before additional conflicts and violence arise.

On May 7, 2001, the Attorney General announced that the Civil Rights Division's Special Litigation Section would conduct a pattern or practice investigation of the Cincinnati Police Division's ("CPD") use of deadly and non-deadly force to determine whether violations have occurred. The investigation was authorized pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141.

A team from the Justice Department, including Civil Rights Division attorneys and police practices experts, have been meeting with City officials, including the City Manager, the Mayor, the Acting Safety Director, the City Solicitor, the Police Chief, and the City's outside counsel. At those meetings, Justice Department representatives have discussed how the investigation would be conducted and the standards to be applied, answered the questions of City officials, and begun discussions regarding CPD policies and procedures for the use of deadly and non-deadly force, investigations, training, management, supervision and discipline. The City has already provided some relevant documents to the Justice Department, including the CPD's policies and procedures and some training materials. The City has promised to provide considerable additional documents regarding CPD policies and procedures, as well as reports pertaining to incidents in which the CPD used deadly or non-deadly force. Justice Department representatives have also met with the local chapter of the Fraternal Order of Police, the Black Police Officers' Association, the legal defense bar, attorneys who have brought a class action suit alleging that the CPD has engaged in discriminatory policing, the NAACP, and various other community groups and individuals with relevant information.

The Department will continue its investigation by conducting a comprehensive evaluation of CPD's policies, procedures and actual practices of deadly and non-deadly force. The Department's investigatory team will be reviewing use of force policies, procedures, training, and incidents, and conducting in-depth interviews with police command staff, individual officers, representatives of police labor organizations, persons who believe that they have been subject to police misconduct, lawyers, and members of the community who have dealings with the CPD.

What is the Department of Justice doing to more effectively respond to police brutality as exhibited in the Amadou Diallo case?

ANSWER: With regard to the Department's efforts to respond more effectively to incidents like the shooting death of Amadou Diallo, the issue of police brutality has been a focus of the Department's efforts to promote police integrity and combat police misconduct. The Civil

Rights Division may bring criminal prosecutions against individual police officers pursuant to 18 U.S.C. § 242. Additionally, we review allegations of police misconduct pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, which authorizes the Department of Justice to seek relief for a pattern or practice of conduct by law enforcement officers that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or federal laws. The Department's Community Relations Service continues to provide training in conflict resolution techniques to reduce tensions between police and the minority communities they serve. Acting Attorney General Eric Holder closed the criminal investigation into the Diallo matter on January 31, 2001.

Since actual changes in existing law may be required for actual prosecutions to occur in such cases in the future, what legislative recommendations does the Department have to ensure that police officers are held accountable?

ANSWER: At this time, the Department has no legislative recommendations relating to this subject matter. Of course, the Department would be happy to review, comment and work with any sponsors of legislation that would affect the Department.

3. Racial Profiling

In March, President Bush met with black leaders, promising black farmers, business owners and college presidents that he would use his time in the White House to "speak for the values that unite our country." To that end, he also promised that the Attorney General is "following through" on the President's plan to end racial profiling. You recently asked Congress to authorize a government study into this problem. What is the status of that report and what is being done?

As you know, the American Civil Liberties Union has filed a class-action suit on behalf of the Maryland NAACP and 11 minority motorists charging that the Maryland Police use discriminatory racial-profiling techniques in stopping drivers along Interstate 95. How does the Department of Justice intend to compensate those who it determines have been the unlawful victims of racial profiling? At the April 4 luncheon you also stated that you intend to review all the Department of Justice's policies on racial profiling, "including training, discipline, the correction of any instance or circumstances in which there is illegal, inappropriate racial profiling." In what situations do you find that racial profiling is acceptable?

ANSWER: Selective enforcement of the law on the basis of race violates the guarantee of equal protection in the Constitution. The Department of Justice is pursuing several initiatives to address the problem of "racial profiling." As you know, on February 27, 2001, President Bush directed the the Attorney General to "review the use by Federal law enforcement authorities of race as a factor in conducting stops, searches, and other investigative procedures." To implement this directive, the Attorney General has asked the Deputy Attorney General to conduct a comprehensive review of the policies and practices of federal law enforcement

agencies to determine the nature and extent of "racial profiling." The Attorney General has asked the Deputy Attorney General to focus his review on a description of the missions and nature of contact, policies, training, and accountability of Federal law enforcement agencies.

The President has also asked the Attorney General to work with Congress to develop methods to collect relevant data from Federal law enforcement agencies and to work in cooperation with State and local law enforcement to assess the nature and extent of "racial profiling." We understand that several members of Congress, including yourself, have recently introduced such legislation in both the House and the Senate to require the Justice Department to conduct a study to evaluate the nature and scope of racial profiling by federal law enforcement. The Department will also take all appropriate steps to assist State and local law enforcement agencies in collecting meaningful data.

Additionally, Federal law authorizes the Department to seek injunctive and declaratory relief against law enforcement agencies who engage in a pattern or practice of discriminatory law enforcement. The Department may also suspend or terminate federal grants to law enforcement agencies that discriminate on the basis of race.

4. Election Reform: Hillary Shelton Report

Reports of voting irregularities in last year's presidential election are well documented. I believe that this is a matter of grave concern to our nation and its people because it is likely that millions of voters across the nation were denied their basic right to cast a free vote and to have that vote counted. Furthermore, there is great evidence that many of the voting irregularities occurred disproportionately in communities of color. President Bush himself recognized this urgency, telling members of Congress: "This is America. Everyone deserves the right to vote." Congress was reaffirmed of President Bush's commitment to the protection of the right to vote when the President's spokesman later assured members of Congress that the "President wants to make certain that one of the focuses of attention this year is electoral reform." A letter recently sent to President Bush by virtually every House Democrat, called on the administration fulfill this promise by providing "essential guidance and leadership on a national problem." We have also asked the Attorney General of the United States to begin a full investigation of all alleged voting improprieties. What has and is being done?

ANSWER: The Justice Department's response to election-related matters has two distinct points of focus. One addresses crimes; the other addresses civil rights violations, such as most of the matters arising out of the last election cycle, which involved lapses or deficiencies in election administration, voting equipment, and technology. Since 1966 the Criminal Division has overseen the federal response to the first type of matter -- intentional corruption of the electoral process (i.e., voter fraud). The incidences of this type of crime have been relatively constant throughout recent federal elections. The Criminal Division will, as it has in the past, continue to enforce federal laws against voter fraud. The Civil Rights Division is responsible for handling the Department's response to the second type of election matter, namely, those that

raise civil rights issues.

With regard to election reform, the Attorney General announced a Voting Rights Initiative on March 7, 2001. An important part of this Initiative is the creation of a new position in the Civil Rights Division – the Senior Counsel for Voting Rights – who will spearhead and coordinate efforts of the Department to address proposals for election reform. The position will be appointed by the new Assistant Attorney General for Civil Rights, Ralph Boyd, who was recently confirmed on July 20, 2001. In the meantime, attorneys in the Voting Section of the Civil Rights Division have been keeping abreast of election reform proposals in both Congress and state legislatures and have been attending conferences concerning election reform issues. The Initiative is also designed to increase the capability of the Department to monitor and observe elections to ensure fairness and compliance with federal law, and the Voting Section has already begun to take steps to increase these efforts. As part of this Initiative, the Attorney General authorized seven new attorney positions in the Voting Section.

With regard to activities related to alleged voting improprieties in last year's election, the Voting Rights Section investigated dozens of matters arising from alleged improprieties in Florida and other states following the 2000 election. Most of the matters were closed by early January, but several still remain active. These investigations address, among other things, alleged violations of: (1) the anti-discrimination and anti-intimidation provisions of the Voting Rights Act; (2) the National Voter Registration Act; and (3) the language minority provisions of the Voting Rights Act which require bilingual assistance to voters who are limited English-speaking.

5. Budget for the Department of Justice's Civil Rights Division

I understand that the FY 2002 budget increases funding for our Civil Rights Division to nearly $101 million, which is a 9.7% increase over FY 2001. Given the dramatic shift in law enforcement needs whether we discuss better enforcement of voter rights laws, the nefarious practice of racial profiling, and other pressing needs that have been exposed by the 200 elections.

If states fail to take corrective action against voting irregularities under existing laws - not to mention the need for election reform-would you not agree that investigators in the field may be severely hampered by inadequate resources for law enforcement activities?

ANSWER: For Fiscal Year 2002, the Administration has requested $391,000 and 5 attorney positions to implement the Attorney General's Voting Rights Initiative. These additional resources will be dedicated to implementing the Initiative, including enforcing voting rights as well as education and outreach to state and local governments on the issues of voting reform. The Department does not believe that its enforcement effort in this area will be hampered by inadequate resources if our FY 2002 budget request is approved.

6. FBI

The Timothy McVeigh case is not an isolated incident.

a) What can the FBI do to handle the spy cases more professionally? What safeguards will be taken to ensure that relevant materials of physical evidence are sent to all parties involved in criminal investigations, especially capital cases?

ANSWER: The FBI has had a history of conducting espionage investigations in a most professional manner. This would include the investigation which led to the identification and arrest of former FBI Agent Robert Hanssen. At the same time, the FBI shares the concern of Congress that it must continue to insure that safeguards are in place that all relevant materials of physical evidence are provided to all of those involved in a criminal prosecution. This is an issue that will be examined as part of the Department of Justice Inspector General review of the Timothy McVeigh matter. In addition, the Webster Commission is reviewing the internal security procedures of the FBI associated with the Hanssen matter. The FBI looks forward to receiving the findings of these reviews and any recommendations which will improve FBI operations and procedures, to include our records management system.

b) Please explain the Department of Justice's oversight of the Hanssen spy matter that compromised so many national secrets?

ANSWER: As required by the Attorney General guidelines governing Foreign Counterintelligence investigations, the FBI coordinated with the Office of Intelligence Policy and Review (OIPR) on electronic surveillance and physical searches conducted under authority of the Foreign Intelligence Surveillance Act. As FISA activity was concluding, approximately three weeks before Hanssen was arrested, the Criminal Division's Internal Security Section (ISS) was consulted – again as provided for in the Attorney General's guidelines. For nearly three weeks, attorneys from ISS and the United States Attorney's Office (USAO) for the Eastern District of Virginia worked non-stop with the case agents and analysts – and with full cooperation of OIPR – to review the voluminous and complex evidence against Hanssen, and to draft charging and search warrant papers and a lengthy affidavit supporting those papers. This process required extensive consultation, at high levels, with several agencies of the Intelligence Community, given the sensitive nature of the investigation and the need for rapid decisions about the need to use highly sensitive classified information in connection with a prosecution of Hanssen. At every stage, the Acting Deputy Attorney General was kept informed of the progress of the investigation and the preparation for Hanssen's arrest. All of this close coordination continued after Hanssen's arrest on February 18, 2001, through the time he entered his guilty pleas on July 6, 2001. An ISS attorney served on the USAO's prosecution team, providing the Section's subject matter expertise, and ISS continued to counsel, and coordinate among, the USAO, the FBI, and the Intelligence Community.

c) Additionally, please give a detailed status report of the FBI's handling of the Wen Ho Lee case. I was surprised to learn that the government indicted Mr. Wen Ho Lee on 59 counts of mishandling nuclear weapons secrets. He spent

nine months in solitary confinement. Please explain why fifty-eight counts were later dropped amid accusations of ethnic profiling and charges that the FBI withheld internal memos suggesting that Mr. Lee did not transfer missile technology to the Chinese.

ANSWER: Lee was indicted for removing, concealing, tampering and altering writings containing Restricted Data; acquiring writings containing Restricted Data; obtaining writings related to the national defense; and retaining writings related to the national defense. All of these charges were based on Lee's unauthorized transfer to an unsecure computer, and then onto portable computer tapes: (1) classified computer codes used to model nuclear weapons explosions; (2) classified data tables describing the properties of materials in nuclear weapons; and (3) classified models of actual nuclear weapons. Lee eventually pleaded guilty to one count of retaining national defense writings, a felony punishable by a maximum of ten years in prison. The remaining charges were dismissed. It was not until after the plea agreement was entered that Lee was obligated to explain what he did with the tapes he made.

This plea agreement was reached because the trial court judge, Judge Parker, viewed the case as one appropriate for mediation, because he had ruled in favor of the defendant as to the relevance of the classified data to his defense, and because the court had indicated he would allow the defense to offer expert testimony that the information at issue was not significant. The order regarding mediation indicated that the court did not believe the case should go to trial if the government could get the information it needed--the disposition of the tapes. However, the court's other rulings together indicated that in order to try Lee, the government would likely have to tolerate significant disclosures in the courtroom of the very information Lee was charged with illegally gathering. On top of these rulings, the government's case was also damaged by the investigation at Los Alamos of two missing hard drives containing classified data--which suggested that security was generally lax at the laboratory--and by the admission of the FBI agent in charge of the Lee case that he had testified incorrectly. For all these reasons, the government entered into the plea agreement.

The allegations of ethnic profiling had no input into the government's decision. Nor did it in fact occur. In addition, the government did not improperly withhold any documents from Lee. The discovery issues that were pending at the time of the plea agreement did not involve any documents suggesting Lee might not have compromised classified information to China. In fact, Lee was provided with internal FBI documents on this issue.

7. COPS program

Why do you support the elimination of the hiring portion of the COPS program, despite its demonstrated success in reducing domestic violence, gang violence and drug related crimes?

ANSWER: The COPS budget reflects the ongoing commitment to state and local law enforcement that COPS has established over the last six years. It builds on what we have

achieved thus far and addresses the most pressing needs of law enforcement, including technology, school safety, and police integrity. The COPS program has met its goal of funding 100,000 officers; therefore, we are focusing on providing more money for law enforcement technology and asking for $180 million for the hiring program to be used primarily to fund additional school resource officers. Some funding may be used for general officer hiring.

8. Prosecution of Vieques, Puerto Rico bombing grounds protestors

Do you support the harsh sentences given to the protestors at the bombing grounds at Vieques, Puerto Rico? Why was Peter Strasser, a Naval Reserve U.S. Attorney from New Orleans, permitted to prosecute these cases?

ANSWER: The imposition of sentences in all criminal cases is the responsibility of the courts. While it is true that prosecutors can make a sentencing recommendation, the ultimate sentencing determination rests solely with the court. In the course of prosecuting the persons charged with trespassing at Vieques, the United States Attorney's office for the District of Puerto Rico has, except in a few cases involving repeat offenders, remained silent on sentencing matters that are appropriately left entirely to the sound discretion of the United States District Court for the District of Puerto Rico. The sentences thus far imposed range from probation, fines, and time already served to lengthier sentences of up to four months for repeat offenders. These sentences are well within the range permitted by law.

The Assistant United States Attorney from the Eastern District of Louisiana who is handling the protest cases in Puerto Rico is also a Naval reservist. This prosecutor has been temporarily detailed to Roosevelt Roads Naval Station at Puerto Rico and has been sworn to service as a Special United States Attorney for the District of Puerto Rico. His detail has allowed the Department of Justice to address the trespassing prosecutions while continuing to afford prosecutorial resources for other criminal cases in Puerto Rico. His participation in these cases is entirely proper and consistent with Department of Justice policy.

9. 245(i)

As you are aware, Congress passed legislation extending section 245(i) of the LIFE Act for four months. President Bush also called for an extension of section 245(i) and in discussion with White House staff, President Bush seemed open to a year extension. What is the position of the administration on a year extension? It has been reported that the President favors the one-year extension. If this is true, can you help us improve the bill as it moves through the Senate?

ANSWER: As you indicated, the President has expressed support for an extension of section 245(i). The Administration however, has not taken a position on the specific length of the extension.

10. Restructuring

Is it true that the Administration is working on a bill to restructure the INS? We have heard a lot of talk about that around here, but we haven't seen a blueprint, or a summary of a bill? Is there one in the near future, and if so what will it do? Will it break the agency up into two entities with a single leader from Justice heading it up?

ANSWER: The President has endorsed the concept of separating the INS's enforcement and service functions. Commissioner Ziglar is currently developing his recommendations on restructuring. As soon as the Administration reviews the Commissioner's recommendations, the Department and the INS will meet with interested Members of Congress to discuss the issues. The Attorney General looks forward to working with Congress as the Administration moves forward with developing its proposal.

11. Bush/Mexico Talks

Where are they going? Is there any progress on subjects like the status of agricultural workers, racial profiling at the border, and amnesty for those who still have been locked out of the deal last year?

ANSWER: We are engaged in wide ranging talks with Mexico on a variety of immigration and other issues. Presidents Bush and Fox created a high level working group consisting of the U.S. Attorney General and Secretary of State and the Mexican Secretary of Interior and Secretary of Foreign Relations to oversee these talks. The Departments of Justice and State have been providing - and will continue to provide - briefings to Congress on the status of the talks and we will continue to solicit input from Congress and others on these important matters.

12. Premium Processing

This allows U.S. businesses to pay a $1000 in exchange for the 15-calendar day processing of their petitions and applications.

INS has stated that it estimates, beginning FY 2002, it will collect approximately $80 million annually from the program and that the revenue generated from the program will be used to hire additional staff and make infrastructure improvements.

a) Will the entire $80 M be put towards additional staff and infrastructure? The FY 2001 budget states that 20M will be used for services. How will the remaining 60M be spent?

ANSWER: Of the $80 million INS projects it will collect from Premium Processing, $20 million is slated for backlog reduction, approximately $30 million will be used for salaries and expenses for adjudication and anti-fraud activities, and $30 million will be used for information technology infrastructure improvements.

b) Many people worry that better service for a few will mean worse service for the rest. Has additional staff already been hired to adjudicate requests for

premium processing for this year? If not, how will this not have an adverse impact on the already existing backlogs, since adjudicators are being pulled off these cases to work on premium processing cases?

ANSWER: The INS has hired additional staff to adjudicate requests for premium processing this year. Premium Processing Service does not create a new workload for INS. Rather, it establishes new streamlined procedures for handling an existing workload. Therefore, INS believes it will not merely maintain processing time on non-premium benefit programs but will use the additional resources to reduce processing times and elimination backlogs.

c) **Assuming it takes a year to get someone hired in the federal government and another year to train a person to adjudicate the different kinds of applications, how is it possible that the backlogs that currently exist will not get worse?**

ANSWER: These assumptions are not correct. The INS is adding 141 officer and clerical positions to staff Premium Processing. The INS has already filled more than 80 percent of these positions and nearly 50 percent of the new personnel have entered on duty. Standard introductory training for adjudications officers lasts 5 weeks. Therefore, in light of the fact that Premium Processing does not create a new workload, INS believes the program will help eliminate backlogs.

13. $500 million for Services/Reductions in backlogs.

The FY 2002 Budget for INS includes $100M as part of a five-year plan totaling $500M to reduce backlogs at the district offices and Service Centers. Could you please explain what type of plan has been devised?

ANSWER: The INS is currently developing a detailed plan to eliminate backlogs and obtain a 6-month processing standard for all immigration benefit applications. The INS will achieve these goals by implementing a plan that will achieve a high-level of performance, transform business practices, and ensure program integrity. To achieve a high-level of performance, INS will set and monitor specific 6-, 12-, 18-, and 24-month application completion milestones for every office. To transform business practices, INS will implement several streamlining information technology and application processing improvements. To ensure program integrity, INS will institute an expanded quality assurance program for application processing. Once the plan has been completed, the Department and INS will fully brief Members of Congress.

14. Unaccompanied children.

As you know this was a big problem last year with the Elian Gonzalez case. Many members believe that the INS does not handle the issue of what to do with unaccompanied minor children? Is the administration in favor of fixing this problem or having an extra office within the INS that specifically deals with this problem?

ANSWER: The Department of Justice is committed to treating unaccompanied minors with dignity, respect, and special concern. The Juvenile Affairs Division, part of the Headquarters Office of Detention and Removal, has been established within INS to serve as a central policy office on juvenile matters, to coordinate services in the three INS regions, to promote best practices, and to respond to the needs of children who have been entrusted into the custody and care of INS. The primary mission of the division is to develop and maintain a continuum of effective programs and services and policies and procedures that affect children in INS custody.

As currently configured, the Director of Juvenile Affairs provides oversight to a staff that includes grant and program managers with child welfare and juvenile justice experience. Juvenile Affairs oversees just over $18 million in grants for residential care and services for children. In FY 2000, services were provided to 3,017 children. These grants were awarded to non-profit agencies that have experience working with migrant and refugee children. While juveniles are in the legal custody of INS, the Program provides care, protection, and appropriate housing to those in its custody. This is accomplished by contracting with child-care professionals in the public, private and nonprofit sectors. In addition, home assessments are conducted by the service providers to assist INS in making sound placement decisions. Services are provided by culturally sensitive staff. Services include: food, clothing, shelter, routine and emergency medical and mental health services, educational classes, recreational programs, individual and group counseling, and access to free legal services.

Juvenile Affairs works in concert with three Regional Juvenile Coordinators to meet the needs of children who are placed in INS custody. The Regional Coordinators work closely with approximately 20 District Juvenile Coordinators to facilitate effective placement decisions. There are over 90 service contracts that are administered by the Regions for secure and non-secure residential services. In FY 2000, 4,675 children were place in INS custody, with an average length of stay of 36 days. Most juveniles are males between the ages of 15 to 17 and come from the countries of Honduras, El Salvador, Mexico, Guatemala and China.

Finally, as a part of the broad effort currently underway to restructure the INS, the Department of Justice will be considering whether and how to modify this existing capacity and where it will best fit into the new organizational structure of the agency.

15. Roger Gregory.

Last year before he left office, President Clinton nominated Roger Gregory to the Fourth Circuit Court of Appeals. Not only is he a distinguished judge, but he is the first and only African-American to be nominated to this bench. Will you and can you commit right now on the record to support Judge Gregory's nomination?

ANSWER: Judge Roger Gregory's nomination has been confirmed by the Senate.

Questions Submitted By Representative Meehan

1. Last year, the U.S. Department of Justice's civil lawsuit against the tobacco industry was funded at approximately $23 million. The Department's tobacco litigation team say that they need $57.6 million for the coming fiscal year to proceed with discovery. And yet, this Administration has requested $1.8 million – a 90 percent cut from last year's funding.

When is a decision going to be made on whether to pursue this case? And, when there is a decision, will you tell us what that decision is, and explain the rationale for that decision?

ANSWER: Funding requirements for the tobacco litigation will be determined by a number of factors, including the Court's decisions on several pending motions and recommendations to the Attorney General from his subordinate senior managers. It should be noted that the Department of Justice's FY 2002 budget request is identical to its FY 2001 budget request. The FY 2001 budget request was silent on the level of reimbursements that would be sought to support the tobacco lawsuit. Reimbursements from other agencies were negotiated at the beginning of the current fiscal year. For FY 2002, the Department plans to use the same process to determine our funding needs based on our expectations at the beginning of FY 2002 and the requirements of the lawsuit.

2. There have been stories in the Washington Post and the Wall Street Journal stating that senior Justice Department officials are unhappy with the job that the leadership of Tobacco Litigation Team is doing, and that reassignments are being considered. I know that at a Senate appropriations hearing you said you hadn't made any decisions about staffing of the suit, but can you tell me whether any Department officials have recommended to you that members of the Tobacco Litigation Team be reassigned? Do you believe that the Tobacco Team has done poor job? If so, what were the reasons given for that recommendation? Have members of the Team actually been reassigned?

ANSWER: No recommendations have been received regarding the reassignment of Tobacco Litigation Team members.

3. I understand that Representative Conyers has requested that you provide him with a copy of the March 12th memorandum from members of the tobacco litigation team to the Attorney General discussing the implications of a possible budget shortfall for the tobacco litigation. I also understand that this has not been given to Mr. Conyers. Is there any plan to provide this memo to Mr. Conyers? Or, has a decision been made not to provide it to him?

ANSWER: It is the Department's long standing policy to decline to provide to Congress documents such as the March 12 memorandum which embody internal deliberations pertaining to pending litigation.

Questions Submitted by Representative Bachus

4. *Disparate-Impact Litigation Pursued Under Disparate-Treatment-Only Statutes*

On April 24, 2001, the United States Supreme Court rendered a decision in *Alexander v. Sandoval*. In *Sandoval*, Justice Scalia, writing for a 5-4 Court, held that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964. Justice Scalia wrote that the Court could not uphold a private right of action to enforce disparate-impact regulations that forbid conduct which Title VI – a disparate-treatment-only statute -- permits.

In so holding, Justice Scalia assumed for the purposes of deciding the case on its most narrow grounds that, in general, regulations promulgated under Title VI could validly proscribe conduct that solely has a disparate impact on covered persons. But Justice Scalia called his own assumption into doubt by noting the Court has never held that such regulations could validly proscribe said conduct and that statements made in support of that proposition are in considerable tension with the rule that Title VI forbids only intentional discrimination.

Back on July 14, 1994, Attorney General Janet Reno sent a memorandum to all "heads of departments and agencies that provide federal financial assistance," instructing them to "ensure that the disparate impact provisions in your regulations are fully utilized." Attorney General Reno further stated that where federally-funded programs have disproportionate effects, "those policies and practices must be eliminated unless they are shown to be necessary to the program's operation and there is no less discriminatory alternative."

However, as the Court said in *Sandoval*, Title VI of the Civil Rights Act of 1964, under which discrimination by federally-funded programs is prohibited, *permits* conduct that has a disproportionate effect on covered persons.

a) Is the Justice Department considering overturning Attorney General Reno's directive?

ANSWER: See answer below.

The Civil Rights Division has in several ways engaged in the practice of enforcing disparate-treatment-only statutes under the guise of disparate impact, such as in its enforcement of the Equal Credit Opportunity Act and in its enforcement of the Fourteenth Amendment in the school desegregation context.

b) In light of *Sandoval*, do you think the Civil Rights Division should make it a priority to discontinue using disparate-impact theories to enforce disparate-treatment-only statutes, even when disparate-impact regulations have been issued under those statutes?

ANSWER: See answer below.

On May 10, 2001, Judge Orlofsky, who sits on the United States District Court for the District of New Jersey, issued a supplemental opinion in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*. Judge Orlofsky's supplemental opinion was issued after *Sandoval* had, in effect, overruled an earlier opinion of his issued just five days before the *Sandoval* decision was handed down by the Supreme Court. In his supplemental opinion, Judge Orlofsky held that *Sandoval* did not preclude the plaintiffs from pursuing claims of disparate-impact discrimination in violation of disparate-impact regulations issued under Title VI, so long as the claims are brought under Title 42, Section 1983 of the United States Code. Section 1983, of course, creates a private cause of action against persons, who, acting under color of state law, deprive a person of any rights, privileges, or immunities secured by the Constitution and laws of the United States.

Necessary to Judge Orlofsky's decision was a crucial finding that the EPA – the agency that issued the regulations at issue in that case – had the authority to issue disparate-impact regulations under Title VI, which is a disparate-treatment-only statute. Considering Justice Scalia's opinion in *Sandoval*, it would seem improper for a court to allow a private right of action under Section 1983 for the violation of a disparate-impact regulation issued under Title VI that prohibits conduct that Title VI permits.

c) Do you think that it is improper for a court to allow a private right of action under Section 1983 for the violation of a disparate-impact regulation issued under Title VI that prohibits conduct that Title VI permits?

ANSWER: See answer below.

d) If the *South Camden* case is appealed, will the Justice Department file an amicus brief seeking a reversal of the district court's decision?

ANSWER: See answer below.

e) Will you seek to clarify the issue by requesting an opinion from the Justice Department's Office of Legal Counsel on the legality of disparate-impact regulations issued under disparate-treatment-only statutes, such as Title VI of the Civil Rights Act of 1964?

ANSWER: *Alexander v. Sandoval*, 121 S. Ct. 1511 (2001), was a private suit alleging that a state agency receiving federal financial assistance was violating Department of Justice and Department of Transportation regulations prohibiting disparate impact pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*. The Court held that Congress had not authorized private suits to enforce those regulations. The Department of Justice is studying the *Sandoval* decision and its implications for Title VI and disparate impact regulations generally.

At this point, the legal status of the disparate impact regulations is unchanged.

After *Sandoval* was decided, a district court in New Jersey held that individuals could continue to enforce the discriminatory effects regulations through 42 U.S.C. § 1983. Section 1983 creates a cause of action against persons who, acting under color of state law, deprive a person of any right, privilege or immunity secured by the Constitution or laws of the United States. Relying on Section 1983, a district court entered an injunction halting the opening of a cement plant for which the state had issued a permit. The court found that the pollution caused by the opening of the plant would violate the Title VI effects regulations promulgated by the Environmental Protection Agency. See *South Camden Citizens in Action* v. *New Jersey Dept. of Environmental Protection*, --- F.Supp.2d ---- (D.N.J. May 10, 2001). On June 15, the Court of Appeals for the Third Circuit stayed the district court's injunction, raising a concern about the district court's interpretation of Section 1983. The court ordered expedited briefing and oral argument, under which the cement plant's brief is due no later than June 26, and appellees' brief is due two weeks later. This use of Section 1983 presents complex legal questions with possibly broad-ranging impact. We will continue to monitor this case and any other similar litigation to determine if federal participation is appropriate.

Questions Submitted by Rep. Hostetler

1. Although FACE certainly allows for Justice involvement in prosecution, I would like to know if there are any prudential limitations the Department takes into consideration when state and local officials have the resources to enforce FACE and the Justice Department's resources might be better allocated elsewhere?

For example, I have some concerns about turning low level misdemeanor offenses into cases for federal prosecution. This seems particularly poignant given the previous Administrations lack of enforcement of federal obscenity laws.

ANSWER: In enforcing FACE, the Department has consistently sought to supplement, not supplant, existing state and local law enforcement efforts. Thus, in deciding whether to initiate a FACE enforcement action, the Department considers whether state and local protections against violent, threatening, or obstructive behavior exist and are being effectively enforced, as well as whether state officials themselves have the resources to enforce FACE. In the criminal context, due consideration is given to whether a state or local prosecution has vindicated the federal interest in responding to prohibited conduct in all cases where federal prosecution is contemplated, including all cases in which FACE charges are considered.

2. In this regard, has the Justice Department made any adjustments to the previous Administrations FACE enforcement policy, and if so, what are they?

ANSWER: The Department is committed to the effective enforcement of all federal civil rights laws, including FACE. Through the Civil Rights Division and the National Task Force on

Violence Against Health Care Providers, the Department continues to coordinate a nationwide law enforcement effort to investigate and prevent incidents intended to harm reproductive health care facilities, patients, or providers.

3. Will the Department of Justice (Department of Justice) initiate FACE litigation against pro-life activity that involves civil disobedience or other violations of local law that are no more serious than misdemeanor grade offenses?

ANSWER: The Department evaluates each case based on its particular facts to determine whether a FACE charge or enforcement action should be brought. This analysis focuses primarily on the strength of the evidence of a FACE violation, with due consideration given to any local response to the prohibited activity. It should be noted that first offenses under FACE are themselves misdemeanors, unless they result in bodily injury.

4. What guidelines, if any, does Department of Justice use to determine whether local authorities have adequate resources to enforce applicable local law against pro-life activity?

ANSWER: The Department evaluates whether local authorities have taken action or plan to take action to enforce applicable local laws in a given case prior to instituting a FACE charge or other enforcement action.

5. What guidelines, if any, does Department of Justice use to determine whether a FACE action should be initiated?

ANSWER: The Department evaluates whether the statutory elements of FACE can be proven by the appropriate quantum of evidence and whether local action has vindicated the federal interest in the prohibited conduct.

6. Is it Department of Justice policy to employ the FBI Domestic Terrorism Unit in investigation of non-violent pro-life activity?

ANSWER: FACE investigations are generally supervised by the Hate Crimes Unit of the FBI.

7. How does Department of Justice define intentional "interference" for purposes of FACE?

ANSWER: This term is defined in the statute itself: "interfere with" means "to restrict a person's freedom of movement."

8. How does Department of Justice define intentional "obstruction" for purposes of FACE?

ANSWER: This term is defined in the statute itself: "physical obstruction" means "rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous."

9. How does Department of Justice determine if certain pro-life activity constitutes a problem "national in scope"?

ANSWER: In enacting FACE, Congress made findings that certain violent and obstructive anti-abortion activity constituted a problem national in scope. The Department's role in enforcing that statute is limited to determining whether to file criminal charges or enforcement actions in specific cases.

10. Has Department of Justice made any adjustments to the previous administrations FACE enforcement policy?

ANSWER: Please see the answer to question 2 above.

Questions Submitted By Representative Hart

1. An issue that is very important to my constituents is protecting the rights of law abiding gun owners. Many of these families have a long tradition of hunting and other gun-related sports. These individuals are law abiding gun owners who learn how to use their guns safely and they understand that a gun in the wrong hands can be a dangerous weapon. They also hold a strong belief that those individuals who commit gun crimes should face prosecution.

The President recently announced Project Safe Neighborhoods as a means of effectively prosecuting violations of federal gun laws. Many of my constituents and I support this effort believing that it is moving us in the right direction by effectively prosecuting those individuals who violate gun laws.

To be effective Project Safe Neighborhoods will require additional resources, like the hiring of additional Assistant U.S. Attorneys. Does the budget support hiring these additional assistants in the Department of Justice? Can you provide us with any idea of the projected benefits (potential number of prosecutions, reductions in gun crime, etc.) from providing additional resources to fully implement Project Safe Neighborhoods?

ANSWER: The implementation of this initiative will be accompanied by a substantial commitment of resources for United States Attorneys and state and local law enforcement officials. United States Attorneys will also have several tools especially designed for this initiative at their disposal. Resources available in FY-2001 include:

- **$15.3 million in funding for 113 new Assistant United States Attorneys** to serve as full-time gun prosecutors. These new prosecutors will be deployed strategically to attack the gun crime addressed by this new initiative. They will become part of the specialized gun crime units described above that will focus efforts in this vital area.

- **$75 million to hire and train State gun prosecutors** to work in partnership with federal law enforcement (approximately 600 prosecutors). Because this initiative represents a district-wide, comprehensive approach, the addition of new State prosecutors is essential to complement the federal resources brought to bear against gun crime.

- **$200,000 for Gun Interdiction Training** for state and local law enforcement officers in ten cities. Training is critical to fulfill our program objective of heightened coordination and partnership among all segments of law enforcement.

- **$44 million in state criminal history records improvement grants.** This will ensure that our state criminal records are current - a necessary component to ensuring the safety of our community and our law enforcement officers.

- **$19.1 million in funding to expand ATF's Youth Crime Gun Interdiction Initiative** to 50 cities.

- **$41.3 million in funding to expand ATF's Integrated Violence Reduction Strategy** targeting crime gun trafficking, armed violent offenders and prohibited gun buyers identified by the National Instant Check System.

- **$28.8 million in funding to expand FBI and ATF computerized ballistics technology.**

- **$9.9 million in funding to create nationwide tracing program for 250 cities (ATF).**

- **Development of a community outreach "tool kit"** for United States Attorneys. This will provide United States Attorneys with resources needed to communicate the deterrent message of this initiative at the local level and to garner the vital support of the local community.

The FY-2002 Budget Request includes:

- **$24.3 million to continue funding for FY 2001 gun prosecutors and for 94 more Assistant United States Attorneys** dedicated to school gun violence and juvenile gun offenses. These prosecutors will assist in targeting juveniles who obtain weapons and commit violent crimes, as well as the adults who place firearms in the hands of juveniles.

- **$20 million for new state prosecutors to combat juvenile gun crime.** Because most juvenile crime is prosecuted at the state level, it is necessary to complement our federal effort with resources to address this persistent issue at all levels.

- **$50 million in grants to the states** for hiring gun prosecutors, community outreach, and other gun violence reduction efforts.

- **$75 million in grants to the states** to provide safety locks for handguns. An important method for reducing juvenile crime is to assist parents by securing handguns with safety locks.

- **$35 million in state criminal history records improvements grants.** Ensuring that our state criminal records are current is a necessary component to ensuring the safety of our community and our law enforcement officers.

- **$115.7 million for ATF youth gun crime interdiction initiative.** These ATF-related resources include additional agents, training, ballistics technology and other resources.

- **Continuation of training assistance** from COPS program, the Office of Justice Programs and ATF. As an essential component to any effective law enforcement strategy, this training will keep law enforcement officers and prosecutors current on laws, trends, and practices necessary to maintain their proficiency in reducing gun violence.

A critical component of a comprehensive gun violence reduction plan is understanding the impact of efforts. Enforcement efforts are traditionally measured by counting the number of arrests, prosecutions, and convictions ("outputs") rather than the impact these law enforcement efforts have on reducing crime ("outcomes"). This initiative includes resources to assist the United States Attorneys to measure the long term impact of the programs they implement. Regular reporting to the Department of Justice will be required to assess the outcome, the success of the measures implemented, and to analyze trends – an ongoing consideration of the particular gun crime challenges in each district. This will help to assess our progress and to instill accountability into our enforcement efforts.